

REPORTS  
OF  
CASES ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF LOUISIANA.

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EASTERN DISTRICT.  
NEW-ORLEANS, MARCH, 1835.

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ALLIANCE MARINE ASSURANCE COMPANY vs. LOUISIANA STATE  
INSURANCE COMPANY.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where property shipped from New-Orleans to Liverpool is insured by the owners in London, about the time of the shipment, and is soon after re-landed and stored, and insured by the factors in New-Orleans against fire, "for all whom it may concern," is destroyed by fire, and the London office pays on the first policy: *Held*, that the latter cannot claim indemnity of the New-Orleans office, unless it be a re-insurance, because the claimants have no insurable interest in the property destroyed. Their interest only extended to the risks insured against.

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The contract of assurance, although aleatory in its nature, is nevertheless synallagmatic and consensual in its inception and form, as containing the evidence of reciprocal obligations.

To render a contract of insurance valid, the mutual consent of the parties is necessary. To support it requires proof of *interest* in the person acting and claiming, or those for whom he claims, or their sanction and ratification of his acts, and proof of the loss of the thing insured.

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EASTERN DIST. Factors have the power to insure for the principal owner, without special authority given: but where factors insure property consigned to them, "for account of whom it may concern," and which has been already insured by the owners in another country, the first insurers cannot claim indemnity from the last, when there was no special authority given, or subsequent ratification of the insurance by the first insurers, before the loss happened.

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Underwriters claiming the benefit of re-insurance, must show a special authority given to an agent for that purpose, an *express* contract to that effect, or an express sanction of the acts of an agent effecting a subsequent insurance on the same risk, before loss.

The chairman and directors of the "Alliance Marine Assurance Company" of London, instituted suit against the "Louisiana State Insurance Company" in New-Orleans, for the recovery of an indemnity of two thousand pounds sterling, or eight thousand eight hundred and eighty-eight dollars eighty-eight cents, on a claim of re-insurance.

The plaintiffs allege, that at London, on the 25th of June, 1830, they insured Joseph Smith & Son on three hundred and twenty-three bales of cotton, shipped on board the ship Aurora, at and from New-Orleans to Liverpool, against the usual risks and perils of the sea, the insurance amounting to two thousand pounds sterling; that the ship sailed from New-Orleans the 3d of July, 1830, with the cotton on board, but was stranded at the Belize, returned to the city to repair, and stored the cotton in a ware-house or cotton-press. The consignees and agents of the ship and cargo, acting for the benefit of all concerned, or whom it might concern, made insurance at the office of the Louisiana State Insurance Company, on the 16th of July, 1830, on one thousand one hundred and twenty-seven bales of cotton; including the three hundred and twenty-three bales of Smith & Son, against fire, for the sum of forty-one thousand dollars; that said cotton was insured as stored in the cotton-press of James Freret, in New-Orleans, and while the risk continued was wholly consumed and destroyed by fire, on the 1st of August, 1830.

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They further allege, they have paid two thousand pounds sterling on their own policy of insurance, to Joseph Smith & Son, and that by reason of said payment, and under the policy taken out of the Louisiana State Insurance Company, they are entitled to be indemnified, and claim the said sum of two thousand pounds, equal to eight thousand eight hundred and eighty-eight dollars, eighty-eight cents, on the re-insurance.

They further allege, that the Louisiana State Insurance Company has paid to others under the same policy, the amount of their loss, and to Smith & Son, the balance of the value of their cotton, not covered by the policy in London, but refuse to indemnify and pay them, (the plaintiffs) on the ground that they have no right to claim indemnity under the same policy, or any other.

The defendants pleaded the general issue; and in their answer except to the plaintiffs' right to maintain their action; that they have not complied with the conditions of their policy of insurance, and particularly the eighth article, which relates to notice and proof of loss. They admit the execution of the policy sued on, but deny they are in any manner liable under it.

Upon these pleadings the parties went to trial on the merits.

The evidence shows that the ship Aurora was consigned to the house of Tayleur, Grimshaw & Sloane, in New-Orleans. Her cargo consisted chiefly of one thousand one hundred and twenty-seven bales of cotton, among which was three hundred and twenty-three bales shipped by the consignees to Joseph Smith & Son, in Liverpool. The ship sailed from New-Orleans, the 2d July, 1830, and was stranded at the Balize, returned to the city, re-landed her cargo, and the one thousand one hundred and twenty-seven bales of cotton were stored in the cotton-press of James Freret. On the 16th July, 1830, Tayleur, Grimshaw & Sloane, the consignees of the vessel and cargo, caused insurance against fire to be made in the office of the Louisiana State Insurance Company, on the cotton thus

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stored, for one month. The policy expressed that the insurance was made "on one thousand one hundred and twenty-seven bales of cotton, being part of the cargo of the ship Aurora, stranded at the Belize, and for account of whom it may concern." The policy also contained a clause which says, "in case the buildings or goods herein mentioned, have been already, or shall be hereafter insured by any policy issued from this office, or by an agent for this office, or by any other Insurance Company, or by any private insurers, such other insurance must be made known to this office, and mentioned in or endorsed on this policy, otherwise this policy to be void."

On the 1st of August, 1830, the cotton-press with the cotton stored in it, was consumed and destroyed by fire. The three hundred and twenty three bales, shipped to Joseph Smith & Son, in Liverpool, was covered in part by a marine policy, taken out of the office of the plaintiffs in London, by the owners, on the 25th of June, 1830, "upon certain cotton, the property of Smith & Son, at and from New-Orleans to Liverpool, to sail on or before the 1st of August, 1830." On preliminary proof of the loss of the cotton in New-Orleans by fire being made, the plaintiffs paid the loss, amounting to two thousand pounds sterling. They now seek to recover this amount from the defendants.

James Grimshaw, (of the house of Tayleur, Grimshaw & Sloane,) witness for plaintiffs, sworn says, "that he effected the insurance on the cotton mentioned, in the office of the Louisiana State Insurance Company; that the three hundred and twenty-three bales of cotton specified in the bill of lading, annexed to the policy of insurance, belonged to Joseph Smith & Son, were shipped by witness's house on board the ship Aurora, and after she was stranded at the Belize, were brought to the city and stored in the cotton-press of James Freret, jr., and destroyed by fire on the 1st of August, 1830. The house of Tayleur, Grimshaw & Sloane acted as the agents of all parties interested in the cargo."

This witness also proved that he made the requisite preliminary proof of the loss of the cotton, and the insurance on it, by the defendants. In an affidavit which he made for

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this purpose, on the 16th March, 1831, he makes the following statement: "That the insurance effected by him of the whole cargo of cotton, was made without reference to any particular ownership, and expressly to secure the property against such risk, until it could be re-shipped on behalf of whoever might be interested in it, *owners or underwriters, whether any part or all was covered by marine policies in England.*"

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"That Joseph Smith & Son were covered by a marine policy to the amount of two thousand pounds sterling, which this deponent claims of the Louisiana State Insurance Company, on behalf of the underwriters, who were insured by this deponent against the risk of fire on the same. And the balance of the value or cost of said cotton, to wit: two thousand six hundred and ninety-one dollars eighty-four cents, deponent claims as the agent of Joseph Smith & Son."

It further appeared that the Louisiana State Insurance Company paid the losses on this policy, which were not covered by the policy of the London office. But in making this payment, the insurers expressly say it is made on the value of the property destroyed, "*less the amount insured thereon, in Great Britain or elsewhere.*"

Frederick Secretan, superintendent of the Alliance Marine Assurance Company, in London, a witness examined by commission, on the part of the plaintiffs, in answer to cross interrogatories, says, "that by the law of England, it is clearly and well established that a question of *re-insurance* can never become the subject of litigation; that a re-insurance, unless occasioned by the *failure* of the previous under-writers, is clearly illegal and void."

In answering the cross interrogatory requiring him to state all he knew in relation to the legality and validity of a contract like this, the witness says, "that he believes a contract like the one sued on, is a lawful contract by the law of England;" and, "that he has laid the facts of this case before Mr. Thomas Hale, a gentleman of great experience at Lloyd's coffee-house, as an arbitrator and adjuster of claims,

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and who has made the following observations in writing on this question, in which this deponent entirely concurs."

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'When ships put into port with such damage as to require being unloaded, it is usual to insure cargoes against fire in ware-houses; and in the adjustment of the expenses, the charge for such insurance is always placed to the cargo, consequently the first assurers on the respective goods, pays this premium, in consideration of having been relieved from such risk. It generally happens that the greater part, or perhaps the whole of the cargo is insured, and if the assurers at the intermediate port are to avail themselves of this circumstance, it of course follows, that they take a premium erroneously. I am sure a case will not be found where the premium, or any part of it, has been returned. I expect a precedent for such a plea as that set up by the Louisiana State Insurance Company cannot be found. Such assurances being considered special, do not mix up with other insurances, and I have no doubt the sentiments of every Insurance Company are, that they would not make any inquiry respecting other insurances. First assurers being in the habit of paying premiums to second assurers, give such insurances very much the appearance of re-insurances. But in the present case, the first assurers have not been paid the premium, neither have they in any respect been privy to the second insurance being made, so that the insurance effected by the Louisiana State Insurance Company is not a re-insurance; and, in my opinion, the point of law they appear so desirous of availing themselves of, completely fails them, as it ought to do.'

The policy on which the assurance in London, at the office of the plaintiffs was effected, has the following clause: "the said company bind themselves for the true performance of the premises, confessing themselves paid the consideration due unto them for the assurance by the assured, at and after the rate of twenty-five shillings per cent."

On the evidence of the case, the District Judge who tried it in the first instance, came to the conclusion "that the

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defendants insured for the benefit of all concerned, whether owners or marine underwriters; that the plaintiffs having paid Joseph Smith & Son, are subrogated to their rights. That this is not a case of double insurance or re-insurance, but one which stands on its own' peculiar circumstances. The defendants received the premium for the risk they ran, and no good reason of law or justice excuses them from paying the loss."

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Judgment was rendered for the plaintiffs, from which the defendants appealed.

*Pierce & Hennien* for the plaintiffs.

1. The plaintiffs must recover in this case, because there was no fraud, and that it was a *bonâ fide* loss is admitted by the defendants, as they have paid the owners of the cotton the amount uncovered by the London office.

2. This is not a case of re-insurance, and the plaintiffs could not have been re-insured, *expressly*, as a re-insurance; for, at the time, in England, this policy had not been executed.

3. If it amounts to a re-insurance, yet the rule of law requiring the insurance to be expressly effected as such, ceases, under the circumstances of this case. To protect owners, insurers, or any person who might lose if the cotton was burnt, was the object of Tayleur, Grimshaw, & Sloane, in effecting this insurance; but they could not say who would be the parties interested, and this the defendants well knew.

4. For a case to amount to a re-insurance, it ought to be co-extensive with the original insurance. This is certainly the law as to double insurance, and prevents it from being a double insurance.

5. The court has the most exact testimony from witnesses of great experience and respectability, as to the nature of the contract entered into by the defendants; and Tayleur, Grimshaw, & Sloane were acting on a sudden emergency, for the benefit of they *knew not whom*. The reasons why this case is not classed under the branches of either a re-insurance

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6. In conclusion of this argument, the court is respectfully referred to the authorities for a definition of *re-insurance* and of the *assured*. *Philips on Insurance*, 56, 57, 60.

7. Lord Mansfield could never have here intended that two insurances on the same ship, *not for the same entire risk*, was a *double insurance*; and if hot, the case before the court cannot be deemed one of that description. 1 *Johnson's Reports*, 289.

*Eustis* for the defendants.

1. There has been no compliance with the conditions of the policy, as to the proof of loss; these are *conditions precedent*. 3 *Martin, N. S.*, 223. *Marshall on Insurance*, 811.

2. In fire assurances the contract is one of mere indemnity, and there must be a real interest in the insured at the time of the loss. *Hughes on Insurance*, 506. *Marshall*, 784, 787, 803.

3. If the present contract be a double insurance, it is void by the terms of the policy.

4. But the contract as declared on, is a *case of re-assurance*; that is, one by which the insurers alleged themselves to have been insured. Has such a contract been made by the defendants?

5. The present contract must be governed by the law of insurance, as it is settled in the United States. 5 *Martin, N. S.*, 543. 4 *Louisiana Reports*, 291. 5 *Cranch Reports* 831.

6. By the Law Merchant of the United States, a contract of re-assurance *must be express*; it is not construed by the general description of the assured, "on account of whom it may concern." *Phillips on Insurance*, 74. *Hughes*, 46. 2 *Massachusetts Reports*, 186. 3 *Caine's Reports*, 190. 3 *Vincent, Legislation Commerciale*, 566.

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7. The plaintiffs cannot claim to be insured in this case, because they were without an insurable *interest* in the property. It is not the case of a double insurance. And to be a re-insurance it must be expressly made as such. *Pothier on Assurance*, 96, *Notes to 34. 3 Pardessus*, 240, No. 764-5. *Curia Phil.* 516, No. 5. 2 *Valin*, 65. 2 *Massachusetts Reports*, 776. 3 *Kent's Com.* 226.

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*Mathews, J.* delivered the opinion of the Court.

This suit is brought to recover from the defendants, eight thousand eight hundred, and eighty-eight dollars, eighty-eight cents, which the plaintiffs allege to be owing to them on account of having paid that amount to certain persons styled Joseph Smith & Son, in consequence of a marine policy of assurance, by them subscribed, in favor of said Smith & Son, on the 24th day of August, 1830, in the city of London, &c. They obtained judgment in the court below, from which the defendants appealed.

The facts of the case are the following: Insurance was effected by Smith & Son, on merchandise to be shipped from New-Orleans to Liverpool, (to be laden on the ship Aurora, which was to sail from the former port, on or before the 1st of August, 1830) to the amount of two thousand pounds sterling. Cotton belonging to the assured, was put on board of this vessel, by their factors and agents, Tayleur, Grimshaw & Sloane, to the value of eleven thousand dollars, and upwards. The ship left the port *a quo* on the 3d of July, but met with an accident before she reached the Gulf of Mexico, which caused so serious an injury as to compel her to return and unload, for the purpose of being repaired. Her cargo, which consisted of cotton, was taken out, by order of the shippers, and placed in stores or ware-houses; that belonging to Smith & Son, together with a larger quantity, was put into the ware-house or cotton-press of James Freret, jr., where it was insured against fire, by a policy obtained from the defendants at the instance of the consignees of the ship, on the 14th of July, 1830, to continue in force until the 16th of August following. During this

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period, viz: on the 1st of August, the cotton of Smith & Son, thus insured, was destroyed by fire, and a claim for indemnity in behalf of the insured was made on the insurers; payment was, however, delayed until the latter discovered that, against the greatest portion of the loss suffered by the owners of the cotton, they were secured by a marine policy obtained from the plaintiffs, having effect from the 25th of June, 1830; in pursuance of which, they paid the sum of two thousand pounds sterling, equal to eight thousand eight hundred and eighty-eight dollars eighty-eight cents, to the assured, and now claim this amount from the defendants.

The record contains bills of exceptions to the manner in which commissions to take the testimony of witnesses in England were executed; also objections to the preliminary proof offered by the plaintiffs, necessary to entitle them to support their action, &c. But, in consequence of our conclusions drawn from the entire facts of the case, we deem it unnecessary to examine these matters.

Where property shipped from New-Orleans to Liverpool is insured by the owners in London, about the time of the shipment, and is soon after re-landed and stored, and insured by the factors in New-Orleans against fire, "for all whom it may concern," is destroyed by fire, and the London office pays on the first policy: *Held*, that the latter cannot claim indemnity of the New-Orleans office, unless it be a re-insurance, because the claimants have no insurable interest in the property destroyed. Their interest only extended to the risks insured against.

In the argument of this cause, there was much disputation as to the character of the contract sued on; whether it is a re-insurance or a double insurance, or whether it is neither, and only simply aleatory; not subjected to the rules which govern in either of the former.

We consider it important to settle these questions, as the rights of the parties must be influenced by the nature of the contract under which the plaintiffs claim. It cannot be considered as sole and simple, for two policies existed, subscribed by distinct insurers, and both, according to their terms, covering risks on the property insured, at the time of its destruction and loss; that made by the plaintiffs, having effect from the 25th of June, 1830; and the one executed by the defendants, from the 14th of July, of the same year. The latter can, therefore, be viewed in no other light than as a double insurance, or re-insurance, according to the interest which the plaintiffs had in the things insured, at the time when the defendants assumed the risk for the former. It is not pretended that they were owners, either absolute or *sub modo*; consequently, as such, they had no insurable

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interest. They were concerned and interested only as having assumed the risks to which the property was exposed by the owners. From these premises, one of two conclusions necessarily follows; either that no insurance was effected for them, or that the policy subscribed by the Louisiana State Insurance Company, was a re-insurance, intended to shift the risk from the Alliance Assurance Company, and place it on the last insurers, to the amount of property covered by the policy of the first; for they had no interest or concern in its safety, except as insurers. According to the first of these *hypotheses*, the plaintiffs are without a semblance of claim against the defendants. We have, therefore, only to inquire into the truth of the second, viz: whether a contract of re-assurance was validly made.

A contract of assurance, although aleatory in its nature, is, nevertheless, synallagmatic and consensual, as containing evidence of reciprocal obligations. To render it valid, the mutual consent of the contracting parties is necessary, given either by themselves or persons authorised by them to give such consent. In this respect it differs not materially from all other kinds of consensual contracts. The terms in which a contract of insurance is frequently made, in favor of the applicant and all other persons concerned or interested in the property insured, to support it requires proof of interest in the person acting or his authority to act for others who may be interested, previously given, or their sanction and ratification of his acts, subsequently made, and prior to the loss of the things insured. See *Baldasseroni's Treatise on Insurance*, vol. 1, p. 193, *et seq.* 1 *Phillips*, 58 and 59.

The authority of factors, consignees, and other general agents in relation to property committed to their care, and over which they exercise a qualified ownership, having power to buy, sell, or ship, on account of the real owners, to insure for the latter need not be inquired into in the present case; because, according to the principles already assumed, the plaintiffs cannot be considered as owners, in any shape. Admitting, then, the right and authority of Tayleur, Grimshaw & Sloane, to act for Smith & Son, in effecting the

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The factors have the power to insure for the principal owner, without special authority given; but where factors insure property consigned to them, "for account of whom it may concern," and which has been already insured by the owners in another country, the first insurers cannot claim indemnity from the last, when there was no

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Underwriters claiming the benefit of *re-insurance*, must show a special authority given to an agent for that purpose, an *express* contract to that effect, or an express sanction of the acts of an agent, effecting a subsequent insurance on the same risk, before loss.

The persons, who acted in obtaining the policy from the defendants, had no authority to represent the plaintiffs, previously granted; nor was their agency subsequently sanctioned by ratifying and confirming their acts in relation thereto, before the loss of the property insured. We, therefore, consider the contract, so far as the plaintiffs claim any benefit in it directly, to be wholly null and void.

It is readily seen that our opinion in the present case differs *toto caelo* from that of the learned gentlemen of Lloyd's coffee-house, as disclosed in the testimony of the witness Secretan. The opinions, however, entertained at Lloyd's, in relation to legal questions, are not, in themselves, entitled to any great consideration; they certainly ought to weigh very light in comparison with such as might be pronounced in Westminster Hall.

Hitherto we have considered the case only in relation to rights claimed by the plaintiffs, resulting directly from the contract entered into by the defendants, as having been made for the benefit of the former. But it was contended for them

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in argument, that, although they may not be entitled to sue directly on the policy, yet, having paid more than a rateable portion of the loss occasioned by the destruction of the property insured, (in a risque taken both by themselves and the defendants) they are, of right, subrogated to the actions and claims of the owners, and should have refunded to them a rateable portion of the sum which they have paid in consequence of the loss. This would be to consider the contract sued on, in the nature of a double insurance, which the pleadings do not authorise.

But if they did, it would not benefit the plaintiffs, for the sixth article of the general conditions of insurances, as established by the Louisiana State Insurance Company, was not complied with, at the time the policy was subscribed; consequently the owners themselves could not have recovered from the last insurers, more than the amount of loss not covered by the assurers in London.

The plaintiffs certainly cannot justly pretend or claim to be subrogated to rights and claims which the owners had not themselves acquired. This proposition is so self-evident that the notice of it might well have been omitted.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court cannot be avoided, reversed and annulled: and it is further ordered, adjudged and decreed, that judgment be here entered for the defendants and appellants, with costs in both courts.

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In an action by a vendee against the vendors of his vendor, who are in possession, and claim the contested premises as the original owners; alleging that the sale by them to the plaintiff's vendor was simulated, and had been rescinded and re-conveyed, as appeared by two counter-letters: *Held*, that the question was, whether the plaintiff knew at the time he purchased, of the defects of the seller's title, and that it was simulated, or had been rescinded.

The question of the buyer's knowledge of the defects in his vendor's title, as that the latter held the property by a simulated sale, is one of fact, which the jury has a right to decide, from all the evidence of the case. Where the purchaser, at the time of the sale, has knowledge that his vendor's title is simulated or rescinded, as between the latter and *his vendors*, the plaintiff's situation is no better than the seller to him. The principle is established and settled, that the first vendor has a right to avail himself of a counter-letter in a simulated sale, and recover back his property. His case is more favorable, in relation to the person who purchased from his vendee, when he is defendant, and in possession.

This is a petitory action. The plaintiff alleges he is the *bonâ fide* and legal owner of two tracts of land, or plantations, with the slaves and appurtenances belonging thereto, situated in the parish of Terrebonne, which he purchased from one Phineas Gardner and wife, for the price of thirty-seven thousand, five hundred dollars, by public act, passed before the parish judge of the parish of Rapides, the 6th day of November, 1833. That said lands or plantations were the same which the said Gardner purchased from D. S. and R. J. Walker, by deed or public act, dated the 11th September, 1832. He further alleges that said D. S. and R. J. Walker have, without any right or title, taken possession, and continue to occupy the premises, and deprive him of the possession and enjoyment thereof. He prays that the defendants may be

declared to have no title, and be adjudged to restore and quiet him in the possession, and pay damages and costs.

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The defendants pleaded a general denial. They further averred, that the pretended sale of the disputed premises, from Gardner to Wells, was fraudulent and collusive, and without consideration. They admitted that, being desirous of obtaining stock in the Union Bank, they executed nominal deeds or acts of sale, in July and September, 1832, to said Gardner, then their overseer and manager, and on the same days, took notarial letters of attorney to subscribe for stock, in the name of Gardner, for their benefit; and Gardner, at the same time, executed to them counter-letters, showing the object of the sales, and that they were simulated.

The defendants further state, that Gardner grossly mismanaged their business, so that he was dismissed from their employ, on the 7th of March, 1833. That four thousand five hundred dollars of said bank stock was taken in his name, which he refused to transfer and assign, as he agreed to do; but proceeded to New-Orleans, and fraudulently received two thousand two hundred and fifty dollars, on the property so mortgaged in his name, and soon after quit his residence in the parish of Terrebonne, and removed to Rapides. And that Gardner never occupied, possessed, or visited his said pretended property, or furnished supplies for the plantations and slaves, but falsely and fraudulently sold the same to the present plaintiff, who knew his vendor had no title, and that he was not the owner, and who never put him in possession; and further, that they united together to defraud the defendants, and deprive them of their just title thereto. The defendants further averred, that both Gardner and Wells were destitute of means with which to acquire property, following the vocation of overseers for a support; and that their want of means to make the purchases, as alleged by them, of the valuable property in contest, was notorious. They aver that, in consequence of Gardner's re-conveyances or counter-letters, he is bound to warrant them against his own acts, and all others claiming under

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him. They call him in warranty, and pray that the plaintiff's claim be rejected, his deed from Gardner annulled, and that he be compelled to re-convey to them; and that Gardner be ordered to transfer said property and bank stock to them, and pay the sum of two thousand two hundred and fifty dollars, which he fraudulently obtained on said stock. Gardner pleaded a general denial to the call in warranty.

On the trial, several depositions were read, on the part of the defendants, to show that Wells and Gardner were both overseers, and possessed but little property; and also to raise the presumption that the plaintiff knew of the defective and fictitious title he purchased, and by which Gardner pretended to claim the property he sold. It was in proof Gardner consulted counsel in relation to his titles, before he sold to the plaintiff; but the result of the advice was not disclosed. Negative evidence was produced, inducing the belief that Wells must have purchased with a knowledge of the titles under which the property was sold; and further, that he resides in the parish of Rapides, and never went to take possession, or even to visit the premises. Gardner left the premises when he was dismissed as overseer, in March, 1833. The defendants annexed the counter-letters from Gardner, to their answer, which were read in evidence, and of the following tenor.

"Whereas, there was on this day (11th September, 1832,) passed before the parish judge of the parish of Terrebonne, a sale for the lands specified in said deed of that date, being for three thousand six hundred arpents, &c. Now, all the money specified in said deed as being paid, being refunded by D. S. and R. J. Walker, the grantors, to Phineas Gardner, the grantee, said deed is cancelled, rescinded and annulled, in the same manner as if the said deed had never been executed. Thus subscribed and agreed to, this 12th day of September, A. D., 1832. The stock obtained by Gardner in the Union Bank, to be assigned to D. S. and R. J. Walker." Signed by both parties in the presence of a witness. Recorded the 11th day of February, 1834. Service of the petition in

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this suit, was acknowledged by the defendants, the 17th EASTERN DIST. March, 1835. February, 1834. The sale from Gardner to Wells is dated the 6th November, 1833.

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The cause was submitted to a jury. The district judge charged them that if they considered the private acts between the original parties as counter-letters, they could not be opposed to creditors or *bonâ fide* purchasers, even if he who holds them, be in possession. That if they are not considered as counter-letters, but as acts of sale, under private signature, and had been followed by possession, they were sufficient to protect the defendants against the plaintiff's claim; being followed by possession, they were notice sufficient to put the plaintiff on his guard; and that good faith in him will not avail against a private act, accompanied by possession, &c. That whether these acts be counter-letters, or acts *sous seing privé*, was a question for the jury to determine. The difference between a counter-letter and private act, and their definitions, were explained and given to the jury.

The jury returned a verdict upon the whole evidence, for the defendants. Upon which judgment was rendered, quieting them in their possession of the plantations, lands, and slaves; and that the latter recover of Gardner, the sum of two thousand two hundred and fifty dollars; and that the plaintiff pay all costs. Wells and Gardner both appealed.

*Dunbar, E. F. Briggs and Nicholls*, for the plaintiff, made the following points.

1. The instruments or acts from Gardner to Walkers, are counter-letters, and not acts of sale under private signature; and can have no more effect than the former, when not recorded before the sale to the plaintiff. *8 Toullier, 262.*

2. The defendants considered these acts as counter-letters, and not sales, by mortgaging the property afterwards, and for that purpose obtaining a counter-power of attorney from Gardner.

3. Counter-letters are not good, and cannot have any effect against *bonâ fide* purchasers. *8 Toullier, 262. La. Code, article 2236.*

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4. This court has been called on to give a construction or effect, or to decide on the validity of counter-letters in but four cases that are recollect. Some were between the parties. It is settled that *bonâ fide* purchasers cannot be effected by private and concealed agreements, entered into between parties to a fictitious sale; and that acts under private signature, whose dates are proven by evidence dehors the instrument, accompanied by possession, and when the transaction is *bонâ fide*, are good and valid. 5 *Martin*, 145. 6 *Ibid.* 260. *Ibid.* 429. 1 *Louisiana Reports*, 116.

5. Counter-letters are not included in the terms of the *Louisiana Code*, article 2415-17.

6. Considered as a sale, the acts from Gardner to the Walkers is not good against Wells. The latter acquired a legal possession by public act from his vendor, which a private act does not give. *Louisiana Code*, 2455.

7. But sales under private signature are only good against *bонâ fide* purchasers, from the day on which they are registered, or from the time of *actual delivery*. *Louisiana Code*, 2242.

8. There being no registry, the Walkers must succeed (if at all) by *actual delivery*. There is neither *actual* or *symbolical* delivery to them. Possession if proven would not suffice.

9. Possession without registry of title by private act, is not sufficient. The Code requires both registry and possession. *Louisiana Code*, article 2417. This article is cumulative in its provisions, and the contradictions between it and 2242, must be reconciled by giving effect to the last article in the Code. 6 *Louisiana Reports*, 145.

10. This court has decided the following cases, in relation to sales by acts *under private signature*:

1. When not recorded, is not good against third persons. 3 *Martin*, 616.

2. Vendor's privilege, to effect third parties, must be recorded. 1 *Martin*, N. S. 384.

3. When accompanied by possession, is good. 2 *Martin*, N. S. 171.

4. Sale with possession good, actual delivery not being proved. But not good against purchasers to whom delivery was made. *4 Martin, N. S.* 368.

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5. Not good without actual delivery. *7 Martin, N. S.* 579.

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6. Act of 1816 not repealed by *Louisiana Code*. Registry of sale still necessary. Evidence of sale, possession and actual delivery good. *7 Martin, N. S.* 662.

7. Sale made with the avowed intention to defraud, is null and void. *2 Louisiana Reports*, 81.

8. Sale dates only from its registry. *4 Louisiana Reports*, 273.

9. Sale of slaves not necessary to be registered in the parish. *4 Louisiana Reports*, 338.

10. Sale not registered, accompanied with possession, not good against a recorded mortgage. *4 Louisiana Reports*, 239.

*Louis Janin*, for the defendants.

1. This case presents only a question of fact. The evidence leaves no doubt that the plaintiff purchased with a knowledge of Gardner's fraud, and combined with him to defraud the defendants of the property he claims.

2. But even had the plaintiff purchased in good faith, the defendants would be entitled to relief; for a sale under private signature, accompanied by possession, is valid against third persons, although not recorded. *Louisiana Code*, 2242. *2 Martin, N. S.* 171. *4 Ibid.* 370. *5 Ibid.* 423. *6 Ibid.* 429. *7 Ibid.* 580.

3. In the case where the party relied on a counter-letter, he succeeded, which in all respects produces the same effect as a retrocession by private act. *6 Martin, N. S.* 429.

4. The property claimed was always in possession of the defendants. It is true a sale may be perfect between the parties before delivery, according to the article 2431 of the Code, yet it cannot effect the rights of third persons, until *delivery*, either *actual* or *symbolic*. Before that takes place, the vendee has no rights independent of his vendor,

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and can only exercise those which his vendor had before sale. This is the case between Wells and Gardner.

5. In a sale of slaves, delivery may be either *real* or affected by the mere consent of parties, when the sale mentions that the slave has been sold and delivered, or when the buyer is already in possession under another title. The plaintiff's pretended purchase has none of these requisites, and any one of them at least would be indispensable to give effect to this sale against third parties. *Louisiana Code*, 2454. 6 *Martin*, 4102. 12 *Martin*, 254. 3 *Martin, N. S.* 107. These decisions were made under article 28, page 350 of the *Civil Code*, which is identical with article 2454 of the *Louisiana Code*.

6. A difference exists on this subject between slaves and lands. "The law considers the tradition of immoveables, as always accompanying the public act by which it is transferred." *Louisiana Code*, 2455. *Civil Code*, articles 29 and 30, p. 350. 3 *Martin N. S.* 107.

7. But this feigned delivery will not be supposed to take place when there exists a legal obstacle; as, for instance, when the land has been attached, or when it is held and possessed by a third person, under an adverse title. 3 *Louisiana Reports*, 183. *Pothier, Contrat de Vente*, No. 318.

8. In such a case as the foregoing, therefore, the vendee is only subrogated to the rights of the vendor, and the possessor may resist his claim by any title that would be valid against the vendor.

9. Gardner was properly called in warranty by the defendants. *Code of Practice*, 378. 6 *Martin N. S.*, 391. 6 *Ibid.* 463.

*Knox*, for Gardner, called in warranty.

*Mathews, J.*, delivered the opinion of the court.

In this case, the plaintiff sues to recover from the defendants, certain tracts of land and their appurtenances, as described in his petition; and also a number of slaves and their increase, therein named. Judgment was rendered for

the defendants, in the court below, from which the plaintiff appealed.

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The cause was submitted to a jury, and on their verdict, the judgment of the court *a quo* was based.

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The facts of the case are obscure and hidden, as generally happens where there exists a want of good faith and fair dealing in the parties concerned in a contract.

The evidence shows that the defendants, some time in 1832, made simulated sales of the premises in question, to one Phineas Gardner, for the purpose of obtaining, through his agency, a larger amount of stock in the Union Bank of Louisiana, than they could otherwise have done, according to the provisions of the charter. Thus it is seen that the first act giving rise to the present dispute, was done *in fraudem legis*. Not long after these sales, the purchaser made two acts under private signature, and delivered them to his vendors, acknowledging the simulation of the sales, and that the pretended price had been refunded to him. Gardner, at the time of purchasing was in the employment of the sellers, and resided on one of the tracts of land, as their overseer or manager. There seems to have been two acts of sale executed by the defendants to him; one dated on the 28th of July, and the other on the 11th of September, 1832, and the acts under private signature, have reference to both deeds of sale, but were not recorded until after the sale by Gardner to the plaintiff. Their character is disputed, whether they be counter-letters or re-conveyances. The act of sale from Gardner to Wells, is authentic, and made in due form, and conveys all the right which the vendor derived from the defendants.

In an action by a vendee against the vendors of his vendor, who are in possession, and claim the contested premises as the original owners; alleging that the sale by them to the plaintiff's vendor was simulated, and had been rescinded and re-conveyed, as appeared by two counter-letters: Held, that the question was, whether the plaintiff knew at the time he purchased, of the defects of the seller's title, and that it was simulated, or had been rescinded.

The main question on which the decision of the case must turn, is, whether the plaintiff knew at the time he purchased from Gardner, the defects of the title under which the latter held from the defendants, viz: that the contract was simulated and had been rescinded, or was liable to be rescinded in consequence of subsequent agreements between the parties. This question is one of fact, on which the jury had a right to pass; and whether they considered the private

The question of the buyer's knowledge of the defects in his vendor's title, as that the latter held the property by a simulated sale, is one of fact, which the jury has a right to decide, from all the evidence of the case.

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acts between Gardner and his vendors, as a rescission of their contracts, or as containing a promise to re-convey, having the effect of counter-letters, is immaterial and unimportant in relation to the correctness of their verdict, provided they believed those facts to have been within the knowledge of the plaintiff, at the time of his purchase; for, if he had this knowledge, his situation before the court is no better than that of Gardner would be, were he plaintiff in this suit. The right of a vendor to avail himself of a counter-letter, in a simulated sale, and recover back his property, has been considered an established doctrine in our jurisprudence, ever since the decision of the case of *Griffin's executors vs. Lopez*, 5 Martin, 145.

The principle is established and settled, that the first vendor has a right to avail himself of a counter-letter in a simulated sale, and recover back his property. His case is more favorable, in relation to the person who purchased from his vendee, when he is defendant, and in possession.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs, &c.

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TERRELL ET AL vs. BABCOCK, GARDINER & CO. ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, THE JUDGE OF  
THE CRIMINAL COURT [GRIMA] PRESIDING *ad interim.*

In an action on a promissory note, which is claimed by an intervening party, and when there is a defence or off-set set up, so that the demand and matter in contestation is not liquidated, the court cannot, on a rule to show cause, require the defendant to pay the amount of the note sued on, into court.

When the creditor and debtor are at issue on the amount of a demand, or the validity of a claim, either party is entitled to a trial by jury, or without one if they choose; and no other creditor has a right to interfere and require the sum in contest, to be paid into court, before final judgment.

This action was commenced to recover possession and obtain judgment on a promissory note of twelve thousand dollars, executed by the defendants Babcock, Gardiner & Co., payable to the order of P. S. Newton & Co., and by them endorsed and deposited in the Canal Bank until maturity, for collection. The note was payable at a future day, with six per cent. interest. The plaintiff had the note sequestered by the sheriff, before it became due. He prays for judgment "against Babcock, Gardiner & Co., and the endorsers, and that they pay said note to him," (the plaintiff.) Taylor intervened, and claimed to be the true and legal owner of the note, and entitled to recover its amount.

The suit was filed the 30th June, 1832, and the note was not due until July following. The defendants (Babcock, Gardiner & Co.) excepted to the suit as premature. While the case stood on this exception, and before any further proceedings were had, Taylor, the intervenor, took a rule on the defendants, to show cause why they should not pay the whole amount of the note into court. They showed for cause, that they were sued on their note or obligation, which

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suit was not yet tried, and that they had the right to a trial on the merits; that they had a valid defence, and a large claim, between four and five thousand dollars of actual payments or advances made to the plaintiff and intervenor, which would go to extinguish a large portion of the claim; and finally, that they could not be required to pay a debt demanded in a regular suit, by a rule of court. The rule was made absolute. From this order the defendants Babcock, Gardiner & Co. appealed

*Curry*, for the appellants, submitted the case, *ex parte*, on the following points:

1. The defendants and appellants cannot be required to pay the amount of their note sued on, when they have a valid defence to the merits, until the parties are heard, the case tried and a regular judgment obtained.
2. The defendants showed, in answer to the rule, that they had a valid defence to make, and payments to plead; and they should have been heard on the merits, before any order was made, or judgment rendered in the cause.
3. The circumstance of the note in suit, or its proceeds being in dispute between two adverse claimants, could deprive the defendants of their right to a fair trial, and cut off all defence to the action.
4. The rule having been improvidently taken, the judge acting in the District court, erred in making it absolute. This being the case, the order must be set aside, the rule discharged, and judgment entered against the plaintiff and intervenor for costs in both courts.

*Martin, J.*, delivered the opinion of the court.

Terrell, the original plaintiff in this case, claimed to be the legal owner, and entitled to recover the amount of a promissory note executed by Babcock, Gardiner & Co., payable to the order of P. S. Newton & Co., and by the latter endorsed, for the sum of twelve thousand dollars. The note was made payable at a future day, with interest at six per cent. per annum, until paid. It was deposited in the

Canal Bank, for safe keeping and for collection. The plaintiff had it sequestered by the sheriff, and held subject to the final decision of his suit.

The defendants, Babcock, Gardiner & Co., pleaded an exception, that the suit was premature, being instituted before the maturity of the note.

Before this exception was acted on, or any further proceedings were had in the case, Taylor intervened. He took a rule on Babcock, Gardiner & Co., to show cause why they should not pay the amount of their note into court, to abide its ultimate decision. The defendants showed for cause, the pendency of Terrell's suit against them; that they had a good defence against this action on the merits, and a demand in compensation, which would extinguish a considerable portion of the original debt; and they further averred, they could not be proceeded against in this summary way, but were entitled to a trial on the merits, before any recovery could be had.

The rule was made absolute, and from the decision of the judge thereon, the defendants appealed.

The case is placed before this court on the merits. The dismissal of the appeal was not asked for, nor any motion made to effect this object, on the ground that an *order to compel a party to pay money into court*, does not work the *gravamen irreparabile*, which only authorises an appeal from an interlocutory decree.

On the merits, this court is of opinion, that in a case like this, when the demand and matter in contestation is not liquidated, it does not authorise the court to make an order requiring the defendant to bring the money into court. In a suit when the creditor and debtor are at issue on the amount of a demand, or the validity of a claim, either party is entitled to, and has the right to demand a trial in the ordinary way, and even to a trial by jury, if he requires it. No other creditor has a right to interfere when two parties are litigating a claim and matter in contestation between them, so as to compel a settlement in a summary way, and bring the money into court. The effect of the rule made absolute, as in this

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In an action on a promissory note, which is claimed by an intervening party, and when there is a defence or offset set up, so that the demand and matter in contestation is not liquidated, the court cannot, on a rule to show cause, require the defendant to pay the amount of the note sued on into court.

When the creditor and debtor are at issue on the amount of a demand or the validity of a claim, either party is entitled to a trial by jury, or without one if they choose; and no other creditor has a right to interfere, and require the sum in contest to be paid into court, before final judgment.

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EASTERN DIST. case, would deprive the debtor of his right to a trial by jury,  
March, 1835. and cut off all his defence to the action. He should be  
heard, and judgment pronounced before payment is required.

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It is, therefore, ordered, adjudged and decreed, that the  
judgment of the District Court, making the rule absolute,  
be annulled, avoided and reversed; and it is further ordered,  
that the rule be discharged with costs in both courts.

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## KEENE VS. LIZARDI ET AL.

## APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where it appears that the jury were not influenced by the charge of the judge, but found their verdict in direct opposition to it, and on the grounds urged by the plaintiff, he cannot have the verdict set aside because the charge was erroneous and might have misled the jury.

The court will not sanction the rule that the jury must be guided in fixing the amount of damages, by the conduct of the wrong doer, and the value or amount of his property in an action against the owners of a vessel for the wrongs of their agent or captain.

Smart-money or vindictive damages can only be given against the wrong doer or offender, by way of punishment; but not against persons who are only consequentially liable on account of their relation to the wrong doer, as the principal for the acts of his agent.

A cause will not be remanded for errors on the trial, which could have no effect on the merits, or influence the case.

This is an action to render the defendants liable for the conduct of the master and *piloto* of a vessel, of which they are the owners, and to recover damages from them for the injury done to the plaintiff and his wife, on their passage from Vera Cruz to New-Orleans, by the tortious conduct, and

outrageous and indecent treatment of them by the said captain and *piloto*. See the facts of this case stated in *5 Louisiana Reports*, 431, and *6 Louisiana Reports*, 315.

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The damages originally claimed by the plaintiff were twenty thousand dollars. On the return of the case the second time from this court, the plaintiff filed a supplemental petition, claiming one hundred thousand dollars in damages. He further alleges the injuries done to him and his wife by the captain of the vessel, were of so outrageous and diabolical a character that millions cannot atone for them; that the defendants, having the amplest means, omitted to employ proper persons to command the vessel, &c.; that the defendants are immensely rich, so that in awarding damages, the jury are to consider the wrongs and injuries inflicted, in reference to the ability and means of the wrong doers and responsible persons to make compensation. He then prays judgment that the defendants be made liable for the conduct of their captain and *piloto*, and to pay damages as alleged.

The defendants pleaded a general denial. The evidence taken down in writing in the two former trials, together with the documents then introduced, were read to the jury. The defendant introduced two witnesses, who testified to the general good conduct of the *piloto*, while in the command of other vessels. The cause was submitted to a jury, on the testimony as reported in *6 Louisiana Reports*, 315.

On the trial the plaintiff took bills of exception to the opinion of the court, on the following points:

1. The defendant's counsel offered testimony to prove that under the laws of Mexico the owners of vessels are not liable in damages for the improper and indecent conduct of the captain. It was objected to as irrelevant; the Supreme Court having decided the law in this case. But the court admitted it because the plaintiff referred to some laws of Mexico, and the defendant had a right to prove what they were.

2. Because the court did not clearly understand the decision of the Supreme Court, but believed it to be, that the laws of Mexico are to govern as to the part of the contract

EASTERN DIST. executed in Mexico ; and the law of Louisiana, in relation to  
March, 1835. the part executed here ; and it was the province of the jury

KEENE to say what part was executed in Mexico, and what here.

LIZARDI ET AL. It was then necessary to have proof of the Mexican laws.

II. The district judge charged the jury that he did not well understand the decision of the Supreme Court the last time this case was before it, as to what laws should govern the contract of passage, but believed that it was the Mexican law, so far as the contract was executed in Mexico ; and the laws of Louisiana, in relation to the part performed here. But the court was at a loss to state what law was to govern when the vessel was on the high seas. As a general principle in criminal law, the flag is the country, and any high crime committed in a vessel on the high seas, was remitted for trial in the country of the flag. But in regard to contracts on the high seas, they were probably governed by the general principles of law and reason. The court further charged, that it considered it was the general commercial law in Louisiana, and not the Civil Code, that was to govern the contract of passage here, &c. The charge was excepted to for want of precision and clearness.

The jury returned a verdict of one hundred dollars for the plaintiff, in damages ; but being dissatisfied therewith, he appealed from the judgment rendered, in conformity with the verdict.

*Keene, in propria persona.*

1. The judge *a quo* erred in his instructions to the jury. He was commanded by two decisions of this court, in this very case, to lay down to the jury as their guide, the law of this state, which renders the owners of vessels responsible in damages, for the personal wrongs and torts of their commanders towards their passengers, as the only rule which should govern them in making up their verdict.

2. The district judge professed to be ignorant of the part of the *contract of passage* that was executed in Mexico, on the high seas, and in Louisiana ; and of the law applicable to the different places. His charge to the jury on these

matters was so confused and manifestly erroneous as to <sup>EASTERN DIST.</sup> mislead and bewilder them. Had the charge stated the <sup>March, 1835.</sup> principles settled by this court, twice before, in this case, that ship owners were liable in damages, for the torts of their <sup>KEENE  
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3. But even on the judge's refusal to lay down the law to the jury, as directed by this court, he should, at least, in the confusion and doubts of his *Mexican*, high seas and Louisiana *law medley*, have sought refuge under the common maxim of law : "*In tali conflictu magis est ut jus nostrum quam jus alienum servemus.*"

4. Had the Mexican law exempted ship owners from liability for the torts inflicted by their ship masters upon passengers, yet it would have been inoperative in the United States, because the passage contract, although made in Mexico, was to be executed and consummated in this state. Here the law does attach the responsibility to ship owners for the illegal and wanton acts and torts of their agents or captains. This contract is to be governed in its performance by the *lex loci solutionis*. 1 *Gallison*; 375. 8 *Martin, N. S.*, 6 to page 34.

5. The only Mexican law relied on by the defendant to prove that ship owners are not responsible for the conduct of their captains, is a mercantile ordinance or commercial code, promulgated by the king of Spain, in 1829, long since the establishment of the independence of Mexico. This law, therefore, has no force either in Mexico or in this state.

6. The agreement for passage in a vessel, is a contract which, from its nature, implies an obligation on the part of the passenger, that he will conform to the regulations of the vessel ; and on the part of the owners and commanders, that his rights, comforts and baggage will be duly respected and protected. Even by the Mexican laws, as well as of Louisiana, the owners are bound and liable for the acts of the masters of vessels. Their treatment of passengers is connected with their duties and obligations ; and, of course,

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comes within the scope of their employment; otherwise we should arrive at the paradox, the *reductio ad absurdum*, that a functionary would be bound, and not bound to do the same thing at one and the same time.

7. If, then, the owner of a vessel, through culpable neglect or penurious calculations, (as the bad of all sorts is cheaper than the good,) instead of appointing a master duly qualified, should place the vessel under the control of an atrocious monster, he should be strictly and severely answerable in damages, to the party aggrieved, for the atrocities and enormities committed and inflicted by such person or agent.

8. Hence, then, it is clear, first, that ship masters are responsible for their personal torts done to their passengers, in like manner as for injuries done by them to their cargoes; because both classes of wrongs come within the scope of their employment. Second, that ship owners are liable for all wrongs and injuries in the way of damages or indemnity, committed by their captains, within the scope of their employment.

*De Armas* for the defendants.

1. The verdict of the jury cannot be disturbed, because they have pronounced on the points of law and the facts submitted to them. *Code of Practice*, 519, 520.

2. The verdict of the jury must be final, in this case, because it is for the plaintiff on all the points of law and fact, and they are the proper judges of the amount of damages.

*Martin, J.*, delivered the opinion of the court.

This is an action in which damages are claimed from the defendants, as owners of a vessel, on account of the misconduct of the master, in his treatment of the plaintiff and his wife, who were passengers on board during her voyage from Vera Cruz to New-Orleans.

The plaintiff alleges, that the conduct of the master was such, as to allow the sailors to resort at all hours of the day

and night to the cabin, where they were indulged with the free and unrestrained use of spirituous liquors, in consequence of which, they incessantly annoyed Mrs. Keene with gross, obscene and indecent language and gestures, not only when she appeared on deck, but frequently and oftentimes when she had retreated to the cabin.

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The defendants resisted the pretensions of the plaintiff, on the ground that owners of vessels are not liable for the misconduct of the master, in a case like the present. This defence was sustained before the inferior tribunal, but disallowed in this court. The defendants then urged that the law of the *terminus a quo* of the voyage, afforded the only legitimate rule of decision; and that by the Mexican law, owners of vessels are not liable for the excesses of the master. This rule being adopted in the court of the first instance, the plaintiff successfully sought the aid of this tribunal. On the third trial in the District Court, the plaintiff was successful. He obtained a verdict and judgment thereon; but being dissatisfied therewith he has again appealed.

The inadequacy of the damages allowed by the jury, is relied on as the ground on which the judgment is sought to be reversed.

The plaintiff claimed one hundred thousand dollars in damages, and obtained one hundred dollars. The damages awarded amount only to the one thousandth part of the sum demanded as compensation for the injury sustained. This inadequacy is not, however, relied on *per se*, as sufficient to support the plaintiff's application in this court, to have the judgment of the district court reversed. It is further contended that the case affords evidence of the jury having erroneously adopted the Mexican law, as containing the true basis of their verdict; being led into the mistake by the permission given by the judge *a quo* to the counsel of the defendants to read the law of Mexico to them: also by the refusal of the judge to charge the jury that the law of Louisiana contained the correct and legal rule by which they should be guided in making up their verdict, according to

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the opinion expressed by this court, on remanding the case the second time. To the charge which the judge *a quo* finally gave to the jury, to his permission to the defendant's counsel to read the law of Mexico, and refusal to instruct the jury to find according to the law of Louisiana, the plaintiff took his several bills of exception.

The judge *a quo* appears to have declined giving the charge required, on the ground that he did not well understand the opinion of this court, which remanded the case for the present trial. He permitted the Mexican laws to be read, because the defendants had a right to avail themselves of those laws; and he gave such a charge to the jury, as, in his judgment, seemed most proper and correct.

This court is not ready to say that, if the verdict had been for the defendants on such instructions and charge as were given to the jury, it would not have been our bounden duty to reverse the judgment and set the verdict aside.

It is very clear that the jury were guided by both the previous decisions and judgments pronounced by this court in the present case, for they have overruled the defence first set up, to wit: that the defendants, as owners of the vessel, were not liable to the action of the plaintiff, under the law of Louisiana; and they have also disallowed the immunity and exemption which was afterwards set up and claimed under the laws of Mexico. It must, therefore, be concluded that the jury were not influenced by any part of the charge of the judge *a quo*, which might be considered to be contrary to the expressed opinion of this tribunal. If they had been thus influenced, their verdict must have been for the defendants.

Where it appears that the jury were not influenced by the charge of the judge; but found their verdict in direct opposition to it, and on the grounds urged by the plaintiff, he cannot have the verdict set aside, because the charge was erroneous, and might have misled the jury. The plaintiff has, however, contended that the inadequacy of the damages is so great that it must be evident that some of the jury were influenced and must have considered the law of Mexico to be in favor of the defendants. Others must have had doubts, or thought the question under the law, doubtful; and the consequence of this error was, to mislead some and create doubts in others of the jurors, and in order to relieve themselves from duresse, all agreed to compromise on a verdict of one hundred dollars for the plaintiff.

It has been said that some times in England, judges hang EASTERN DIST.  
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wretches, that jurymen may dine. We hope that no American jury would mulct a fellow citizen in damages in a case where the law disallows them, and which is so expressed in the opinion of the highest tribunal of the state.

But this court knows of no rule, no *data* by which a correct measure of damages can be ascertained and meted out, in a case like the present. The rule contended for by the plaintiff, appears to us so fallacious that we cannot believe that any jury could ever have adopted, or any court of justice sanctioned it. He urges that the jury must be guided in fixing the amount of damages, by the conduct of the wrong doer, and the value or amount of his property. If that be the case, he who has wasted his property is sure of comparative lenity or impunity. According to this rule, if the jury considered the wrong doer, who, in the present case, is the captain, as a very poor man, the sum of one hundred dollars is as much as they could justify themselves in giving. The circumstance of his having rich owners for his employers, ought not to aggravate the damages to which the plaintiff is entitled for his misconduct; as whatever sum he might recover from the owners, the latter ought to recover from the captain. Thus the captain would be mulcted in proportion to the wealth of the owners. He would, according to this rule, be required to pay much more if the owners were sued (as is now the case,) than could be legally recovered in a suit against himself individually, in the first instance.

It is true, juries sometimes very properly give what is called smart money. They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct: but this is only justifiable in an action against the wrong doer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent.

The plaintiff has further contended that the defendants in this case, are liable as wrong doers, because, although they are immensely rich, their parsimony led them to employ

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The court will not sanction the rule, that the jury must be guided in fixing the amount of damages, by the conduct of the wrong doer, and the value or amount of his property in an action against the owners of a vessel, for the wrongs of their agent or captain.

Smart money or vindictive damages can only be given against the wrong doer or offender, by way of punishment; but not against persons who are only consequentially liable on account of their relation to the wrong doer, as the principal for the acts of his agent.

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EASTERN DIST. *cheap agents.* This position is not only unsupported, but is contradicted by the evidence in the cause. The record contains no evidence of the alleged wealth of the defendants, and we have no legal means of knowing their means and condition in life.

A cause will not be remanded for errors on the trial, which could have no effect on the merits, or influence the case.

This court has frequently held that a cause would not be remanded for errors on the trial which could have no effect on the merits or influence the case. *3 Martin, N. S., 532, 576, and 284.*

From all that appears, the jury decided the law correctly. If they erred in the assessment of damages, this court will not attribute it to any misdirection of the judge, who declined to express any opinion as to the proper measure of damages. Nothing authorises the belief either that the amount of damages awarded is not the proper one, or that if the case was remanded, another jury would come to a different conclusion.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in that court, the plaintiff and appellant paying the costs of this appeal.

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vs.  
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ANSELM vs. WILSON.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE  
THEREOF PRESIDING.

Where a defendant is sued on his promissory note, and alleges error, that the amount and consideration for which it was given was paid to another person who was to save him harmless, and whom he calls in warranty: *Held*, that it is not such a case of simple or personal warranty as authorises a delay for calling in the warrantor.

On a motion for a continuance on an affidavit that the defendant could prove payment to a third person, who was to save him harmless: *Held*, that the continuance was properly refused, when the fact to be proved would not have benefited the party applying for it.

This is an action on a promissory note executed by the defendant, for the sum of three hundred and fifty dollars, payable to the plaintiff.

The defendant admits the execution of the note, but denies she is liable. She avers the note was given in error, that the sum which forms the amount and consideration of the note, was paid by her to Joseph Erwin, in his lifetime, who bound himself to hold her harmless against the claim of the plaintiff. She prays that Mrs. L. Erwin, who has accepted her husband's succession, be called in warranty to assist in defending this suit, and that she pay one-half of any judgment that may be rendered against this defendant.

On motion of the counsel for the plaintiff, so much of the answer as relates to the call in warranty was stricken out.

The defendant applied for a continuance, on affidavit filed, stating that she expected to prove by certain witnesses, that the plaintiff's claim had been wholly, or in part paid, as set forth in the answer. A commission had been taken out, but not returned to take this testimony. The continuance was refused.

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Judgment was rendered for the amount of the plaintiff's claim against the defendant, on the 2d November, 1833. From this judgment the defendant appealed. During the pendency of the appeal, the defendant died.

*Labauve* for the plaintiff and appellee, suggested to this court the death of the appellant, since the return day of the appeal, and moved for leave to cite in her legal representatives. The court ordered them to be cited to appear on the first Monday in March, 1834.

Service was made on D. D. Chesnut, as testamentary executor of the deceased appellant. Chesnut denied that he was executor. Upon this allegation, this court made the following order in writing:

*Martin, J.*, delivered the order of the court.

The death of the defendant and appellant having been suggested to this court in January last, leave was given to the plaintiff and appellee to bring in the legal representative of the deceased party. He accordingly had D. D. Chesnut cited, in his character of testamentary executor of Mrs. Eliza Wilson, deceased, to defend and prosecute this appeal in her place. This person has appeared and denied that he is the executor. This forms an issue which cannot be tried in this court.

It is, therefore, ordered that this cause be remanded to the District Court, with directions to have the issue tried of *executor vel non*.

On the return of the case to the District Court, and upon the production of the exemplification of the order of the Court of Probates, for the parish of Iberville, admitting the will of Mrs. Wilson to probate, which appoints and institutes Mr. D. D. Chesnut executor, he was declared to be her testamentary executor accordingly.

The appeal in this cause was heard on the defence of the testamentary executor.

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*Labauve* for the plaintiff.

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*Stacy & Ives* for defendant and appellant.

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*Bullard, J.*, delivered the opinion of the court.

The appellant seeks to procure the reversal of the judgment rendered in this case, on the two following grounds: first, that the court erred in rejecting the call in simple or personal warranty; and second, that a motion for continuance, based on the affidavit of the defendant's counsel, was improperly overruled.

The suit was brought to recover the amount of a promissory note subscribed by the defendant. She admits her signature, but alleges error, and that she had paid Joseph Erwin the amount before the note was given, and that he had promised to save her harmless against the note, and became her warrantor. She prays that he may be cited in warranty. The court afterwards, on motion, rejected the call in warranty.

We are of opinion the court did not err. This does not, in our opinion, present a case of simple or personal warranty, within the meaning of that part of the code which authorises delay for calling in the warrantor. There does not appear to have existed any privity between the plaintiff and Joseph Erwin, who was a stranger to the contract sought to be enforced. *Code of Practice, art. 379, et seq.* 5 Merlin's Rep. *verbo garantie simple.*

The continuance was, in our opinion, properly refused. The fact of payment either in whole or in part, which the party expected to prove by the absent witness, was not a payment of the note sued on, to the holders, but a payment to Erwin, before the date of the note, of which it is not pretended the plaintiff was conusant. If the defendant was not entitled to a delay, in order to have her recourse in warranty, she was not entitled to a continuance in order to prove the facts on which her claim in warranty was founded.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

Where a defendant is sued on his promissory note, and alleges error, that the amount and consideration for which it was given, was paid to another person, who was to save him harmless and whom he calls in warranty: Held, that it is not such a case of simple and personal warranty, as authorises a delay for calling in the warrantor.

On a motion for a continuance on an affidavit, that the defendant could prove payment to a third person, who was to save him harmless: Held, that the continuance was properly refused, when the fact to be proved would not have benefited the party applying for it.

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vs.  
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EYMAR vs. LAWRENCE ET AL.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF  
NEW-ORLEANS.

The creditor who proceeds against the property of his debtor by provisional seizure and sequestration, acquires no privilege thereon, until he has obtained a judgment, and execution issues on it.

The privilege of the captain of a vessel for his services, advances made and expenses paid on her last voyage, does not extend to the insurance money received as indemnity on her bottom, paid by the underwriters, when she is lost or destroyed by the perils of the sea.

In voluntary sales of a ship or vessel, the creditor can pursue it, and exercise his privilege on it in the hands of the vendee; and in forced sales the privilege attaches to the *price*, and the purchaser takes it free of incumbrance; but when the ship is lost or perishes by the perils of the sea, the privilege is lost with it.

When goods are lost at sea, which are insured, they are not represented by the sum or insurance money received from the underwriters, and the vendor's privilege does not extend thereto.

This is an action against the owner, and against the proceeds of the schooner Serafina, in the hands of Thayer, Hurd & Co., consignees, who received the insurance money for her loss, from the underwriters. The plaintiff alleges he was the captain in command when the schooner was lost at sea, and that Thomas Lawrence, the owner, is indebted to him in the sum of six hundred and ninety dollars, for wages and disbursements made on account of the vessel, for which he claims his privilege on her price, or funds received on her insurance by the consignees. He prays that Thayer, Hurd & Co., residing in New-Orleans, the agents and consignees of the owner, be made parties to this suit, that a provisional seizure and sequestration of the funds in question be made, and that he have final judgment for the amount of

his claim against the owner and consignees, with a privilege on the funds, and to be paid in preference to other creditors.

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Thayer, Hurd & Co. answered, denying they were the agents of Lawrence, the alleged owner, but corresponded with other persons who consigned the vessel to them. They admit they have funds in their hands, arising from the insurance of the vessel in question, which was lost; but they aver, they have a privilege for their debt and advances due by said vessel to them as consignees, which must be first allowed, and that the balance of said funds, amounting to one hundred and fifty dollars, they hold subject to the order of court.

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On the trial, the plaintiff exhibited evidence of his claim; he produced the sea-letter and register of the schooner, to prove she was owned by Lawrence. After the plaintiff closed his evidence, the defendants Thayer, Hurd & Co. offered J. Thayer, one of their firm, sued as agents of the defendant Lawrence, to prove they were not agents but were acting as consignees of the schooner Serafina, by virtue of letters from other gentlemen than Lawrence, which letters they also offered in evidence. The plaintiff's counsel objected to the introduction of the testimony, on the ground that Thayer could not prove he was agent of another person, because it would be liberating the funds from the plaintiff's claim, and secure them to the firm of which the witness was a member, and because the genuineness of the letters were not proved; and that an agent cannot prove his agency, when he has a direct interest in doing so. The court sustained the objections, and the defendants' counsel took his bill of exceptions.

The parish judge concluded from the evidence and pleadings of this case, that the plaintiff proved his claim, against the schooner and owner Thomas Lawrence; and that Thayer, Hurd & Co. were her consignees, and agents of the owner, who, in that capacity, received the insurance on her; and that they have failed to prove any privilege superior to that of the plaintiff, either on the vessel or the proceeds thereof; judgment was therefore rendered for the

EASTERN DIST. plaintiff, against the defendants Lawrence, and the agents  
March, 1835. Thayer, Hurd & Co., with a privilege on the proceeds of the  
insurance money in the hands of the consignees, for the  
LAWRENCE ET AL amount of the debt claimed, and costs.

Thayer, Hurd & Co. appealed.

*Roselius*, for the plaintiff and appellee, contended, that the proceedings and judgment in this case are regular, and that the appellants were properly condemned to pay the plaintiff's claim out of the funds of the schooner, in their hands as consignees. It is now too late to make objection to any irregularities in the form of the proceedings. *Code of Practice*, 344.

2. The only part of the judgment which can be revised, is that relating to Thayer, Hurd & Co., as they alone have appealed. Lawrence is not before the court, but he being personally liable, the appellants, as his agents, through whom he was cited, are liable for him, having received the indemnity money for the loss of his vessel.

3. It is well established that consignees, as such, can sue for the freight and insurance; and, as a consequence of this, they can be sued for the same demands.

4. The appellants claim a superior privilege on the funds in their hands for advances, debts, &c., of which there is no evidence in its support. But it is shown by the account of Thayer, Hurd & Co., that they had a considerable sum in their hands at the commencement of this suit, which they had collected as freight. Under the maxim of the maritime law, the privilege of the plaintiff attaches to the freight as the "mother of wages."

5. The plaintiff's claim is fully proved. The sea-letter or register of the vessel is the best evidence of the ownership of the vessel, which is corroborated by the testimony of the Spanish consul.

*Maybin* for the appellants, insisted that the Parish Court erred in rejecting his witness to show that Thayer, Hurd & Co. were not the agents of Lawrence, and conse-

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quently were not liable, as agents or consignees, for any claim against Lawrence.

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2. The proceedings against Lawrence are irregular and illegal, as no person was appointed to represent him, &c.

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3. The plaintiff has no claim or privilege on the funds of the schooner, in the hands of Thayer, Hurd & Co. It is not a privileged claim, and this firm is no way accountable to the plaintiff; consequently, the judgment against them is erroneous.

*Bullard, J.*, delivered the opinion of the court.

In this case the plaintiff represents that the schooner Serafina and Thomas Lawrence the owner, are justly indebted to him in the sum of six hundred and ninety-one dollars five cents, for wages as captain of said schooner, and for advances made, and expenses paid on her account; that the Serafina was wrecked and lost in August, 1831, and was abandoned to the underwriters, who paid the amount of their insurance upon her to Thayer, Hurd & Co., as consignees of the schooner and agents of the owner, Thomas Lawrence of Matanzas, and that they have in their hands a large part of the same, so recovered from the insurance company. The plaintiff, averring that he has a privilege on the funds, as he would have on the vessel itself, if she had not been lost, prays for a provisional seizure, and that Lawrence the alleged owner be cited by his agents, Thayer, Hurd & Co., and that the latter may also be made parties; and he finally prays judgment against the owner, and also against the consignees for the amount of his claim, and that he may be paid by privilege out of the proceeds of the vessel, in the hands of the said Thayer, Hurd & Co.

Thayer, Hurd & Co. in their answers, deny that they are or ever have been the agents of Thomas Lawrence, or that he was the owner. They admit that as consignees of the Serafina, they had received from the Insurance Company the amount of the policy, and that they have yet in their hands the sum of one hundred and fifty dollars, over and above the

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The creditor who proceeds against the property of his debtor by provisional seizure and sequestration, acquires no privilege thereon, until he has obtained a judgment, and execution issues on it.

The privilege of the captain of a vessel, for his services, advances made and expenses paid on her last voyage, does not extend to the insurance money received as indemnity on her bottom, paid by the underwriters, when she is lost or destroyed by the perils of the sea.

In voluntary sales of a ship or vessel, the creditor can pursue it, and exercise his privilege on it in the hands of the vendee ; and in forced sales the privilege attaches to the price, and the purchaser takes it free of inemburment ; but when the ship is lost, or perishes by the perils of the sea, the privilege is lost with it.

When goods are lost at sea, which are insured, they are not

amount of advances made by them as consignees, and which they have a right to retain.

Judgment having been rendered in favor of the plaintiff, for the amount of his claim against Lawrence, and against Thayer, Hurd & Co., as consignees, the latter appealed.

The right of the plaintiff to recover of the appellants, must depend upon the question whether he had by law, or has acquired by the proceedings in this case, any privilege or lien on the proceeds of the Serafina, in their hands. The plaintiff proceeded by provisional seizure, and the 724th article of the Code of Practice declares that provisional seizures and sequestration give no privilege to those who have made them, until they have obtained a judgment and order of execution on the property sequestered or provisionally seized. It is, therefore, clear that unless the plaintiff had a legal privilege on the funds, he acquired none by the proceeding in this case. It only remains, therefore, to inquire whether he had such privilege previously and resulting from the nature of his debt.

Among the privileges enumerated in the Civil Code, we find those of the captain and crew of a vessel, for wages on the last voyage, of freighters, material men and others, under various modifications and restrictions, *article 3204*. These privileges are declared to exist on the vessel or its price, when it has been sold. But the code does not contemplate a case like the present, when the vessel had been destroyed and lost by perils of the sea, and the sum insured upon her bottom paid by the underwriters. The code distinguishes between voluntary and forced sales of ships, in reference to privileges. In cases of voluntary sales, the ship itself may be pursued in the hands of the vendee ; in cases of forced sale, the right of the purchaser becomes irrevocable ; he owes only the price, and over it the creditors exercise their right of privilege, *article 3207*. In this last case the price, still in the hands of the purchaser or the officer making the sale, represents the thing itself. But the indemnity received from the insurers for the loss of the ship, either by the owner or his agent,

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appears to us widely different. In the case of *Thayer et al. vs. Goodale*, 4 *Louisiana Reports*, 221, this court held, that when goods are insured and lost at sea, they are not represented by the sum insured, and that the vendor's privilege does not extend thereto. The two cases are strongly analogous; both are cases of alleged privilege, and in both cases the thing itself, on which the privilege attached, had perished, and the stipulated indemnity paid. Upon the principles and authorities established and relied on in that case, we think the plaintiff in this has no privilege on the funds in the hands of the appellants.

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represented by  
the sum or in-  
surance money  
received from  
the underwri-  
ters, and the ven-  
dor's privilege  
does not extend  
thereto.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be reversed and annulled, the provisional seizure set aside, and judgment entered in favor of the defendants, Thayer, Hurd & Co., as in case of a non-suit, with costs in both cases.

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### AUBRY ET AL. vs. CAJUS, EXECUTOR, &c.

#### APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF NEW-ORLEANS.

The intentions of the testator, as expressed in the will, should be carried into effect. But this instrument should be so construed, if possible, as to give meaning and effect to every clause, phrase and word. If contradictory phrases and expressions are used, so absolute in their different meanings as to be irreconcileable, one or the other must yield.

So, where a testatrix bequeathed certain specific legacies to her niece, and a moiety of all her moveable and immoveable property at her decease, instituting her niece a legatee, by a particular and general title; and the balance of her property she wills to the four children of her sister: *Held,*

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that both sets of legatees must be considered as claiming under universal titles, equal portions of the succession, and must both contribute equally to the payment of the particular legacies, debts and costs.

The fee of the counsel for absent heirs, will not be allowed and paid out of the mass of the succession, but should be charged to the portion of the absent heirs.

The plaintiffs, who reside in France, claim to be heirs and universal legatees, and entitled to one-half of the succession of veuve Magnon, who died in New-Orleans, and whose estate is administered by the defendant, as her testamentary executor. The testatrix, in her will, bequeathed to the four children of her sister Elizabeth Roche, the surplus of her property, after giving certain specific legacies and one-half of her moveable and immoveable property to her niece of the second degree, Madame Cajus, wife of the defendant. Three of the children of Elizabeth Roche are plaintiffs. They claim, as universal legatees, one-half of the succession of the testatrix. The Probate Judge, after hearing the parties, decreed that Madame Cajus was entitled to *one-half* of the succession absolutely, and that the plaintiffs be recognised as universal legatees, and that they recover only the balance of the succession, according to an account rendered; the costs to be borne by the succession.

The plaintiffs appealed from this decree.

*Denis*, for the plaintiffs.

1. The only question in this case is, whether the plaintiffs, as universal legatees, are entitled to one-half of the succession, and Madame Cajus, wife of the defendant, to the other equal half? or whether Madame Cajus is only entitled to half of the proceeds of the succession, and the plaintiffs to the other half, after paying the legacies and debts out of it?

2. The plaintiffs are entitled as universal legatees, to one-half of the succession; the whole amount of debts, particular legacies and costs being first deducted and paid from the mass.

*J. Seghers*, for the defendant.

1. It is contended that Madame Cajus is not a legatee, but an heir, and that as such she is not entitled to receive her legacy, which must be left to be equally divided with the balance of the succession, between her and the plaintiffs. The will shows Madame Cajus is not heir, but a legatee by particular and general title, and that she is entitled to receive a determined and specific portion, which was bequeathed to her.

2. From the will it clearly results, that the intention of the testatrix was to put Madame Cajus on a footing with the other legatees, who have been paid in preference to the plaintiffs.

3. The plaintiffs are not forced heirs, and might have been deprived by the testatrix of the whole of her estate. They cannot therefore complain, if Madame Cajus was more favored by the testatrix, having taken care of her in her old age, while they were living far from her, in a foreign land.

*Mathews, J.*, delivered the opinion of the court.

This case presents a single question for decision, depending on the proper and legal interpretation of the will of the deceased. It contains several specific legacies, the amount of each being ascertained, leaves no difficulty as to the *quantum* which must be deducted from the mass of the succession bequeathed to certain legatees, who are to take under general titles.

The question is, whether the debts and specific legacies shall be deducted from the entire estate left by the testatrix, and the balance be equally divided between the plaintiffs and the wife of the executor, who is a legatee both of specific objects, and of one-half of all the property which was left by the deceased at the time of her death, as contended for by the plaintiffs? or whether the whole succession should be divided in such a manner, as to place the burthen of the specific legacies on the portion left to them, considered alone as residuary legatees? The solution

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of this question depends upon the construction which ought to be given to the two last clauses of the will. They are expressed in the following terms: "Je donne et lègue à ma nièce au second dégré, Marie-Elisabeth Paillet, épouse de Mr. Jean-Baptiste Cajus, mon armoire, mon linge et mes bijoux, sans aucune réserve : plus, je donne et lègue à ma dite nièce etc. la moitié de tous les biens de nature mobiliaire et immobiliaire que je délaisserai au jour de mon décès, l'instituant ma légataire à titre particulier et à titre général, de la portion des biens dont se compose la présente disposition. Et pour le surplus de mes biens, je les donne et lègue aux quatre enfans de l'un et de l'autre sexe de ma sœur Elisabeth Roche," etc.

The intentions of the testator as expressed in the will, should be carried into effect. But this instrument should be so construed, if possible, as to give meaning and effect to every clause, phrase and word. If contradictory phrases and expressions are used, so absolute in their different meanings as to be irreconcileable, one or the other must yield.

So where a testatrix bequeathed certain specific legacies to her niece, and a moiety of all her moveable and immoveable property at her decease, instituting her niece a legatee by a particular and general title; and the balance of her property she wills to the four children of her sister: Held, that both sets of legatees must be considered as claiming under

The judge of the court below, in interpreting these clauses of the testament, seems to have arrived at a conclusion by which he decreed to the person first named as legatee, under a particular and general title, one-half of the entire succession, without deduction of the special legacies, considering her, in relation to the one-half of the property left at the decease of the testatrix, as a particular legatee. From the decree thus made, the plaintiffs appealed.

The matter is not without difficulties calculated to produce doubts. But we are of opinion that the court below erred in its judgment. It is the duty of courts of justice to carry into effect the intention of a testator as expressed in his last will.

To ascertain what was really intended is often difficult, in consequence of the want of legal precision in the mode of expression used by the writer of a testament. In the present instance we are unable to discover any thing tending to create ambiguity and uncertainty, except the double and apparently contradictory phrases in the clause which makes the donation to Madame Cajus. It contains a specific and general legacy, and concludes by declaring that the bequest is made under a particular and general title. Rules of construction, in relation to laws and instruments in writing, require, if it is possible, to give meaning and effect to all the words and phrases used in them; but when contradictory expressions are used, so absolute in their different meanings as to be irreconcileable in reference to the same thing, one or

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the other must yield. In considering the clause of the will in question, we are not compelled to invalidate either of the phrases, particular title or general title. The first may be considered as having reference to the specific legacy, given to the same person and in the same clause; and the last to that which was general in its nature, being an undivided half of the succession, &c. Considered in this light, no good reason offers itself to our minds, in consequence of which a distinction should be made between the situation of the present parties litigant, as claimants under the will. They must both be considered as claiming under universal titles, equal portions of the succession, and standing in this relation to the inheritance, they must both contribute equally to the payment of the particular legacies. *Louisiana Code, articles 1604, 1606, 1627 and 1700.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be avoided and reversed, and that the plaintiffs recover of the defendant, the sum of seven thousand six hundred and fifty-one dollars twenty-seven and one-half cents, being three-fourths of the net half of the estate, after deducting from the mass the debts, charges of administration, and the specific legacies, except the fee of counsel for absent heirs; the costs below to be borne by the succession, and those of the appeal to be paid by the appellees.

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equal portions of  
the succession,  
and must both  
contribute e-  
qually to the  
payment of the  
particular lega-  
cies, debts and  
costs.

The fee of the  
counsel for ab-  
sent heirs, will  
not be allowed  
and paid out of  
the mass of the  
succession, but  
should be char-  
ged to the por-  
tion of the ab-  
sent heirs.

## CASES IN THE SUPREME COURT

EASTERN DIST.  
March, 1835.

CLAGUE  
VS.  
CITY BANK.

## CLAGUE vs. CITY BANK.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A bank or other institution taking a security bond from its cashier or other officer, cannot be compelled to cancel and surrender it to the maker, on his resignation and settlement of his accounts, even when they are found correct, and the effects, money and all belonging to the office are delivered over to his successor.

The bank may hold the security bond of its cashier after his resignation and the settlement of his accounts, as an indemnity, should it be afterwards discovered that his conduct, while in office, had occasioned any injury to the institution.

The prescription of three years, elapsing after his resignation, does not extinguish the obligation of a cashier's bond; and, until it is prescribed against, the bank may hold the bond as an indemnity.

This is an action by the plaintiff, against the president and directors of the City Bank of New-Orleans, to compel them to cancel and return to him a security bond, which he gave while cashier of said bank, in the sum of fifty thousand dollars. He alleges, that in October, 1832, he resigned the office of cashier, and handed over to his successor all that ever came into his hands, belonging to said bank, and that all his accounts were found to be correct, by the president and directors thereof; wherefore he prays judgment that his bond be cancelled and returned to him.

The bank refused his demand, and pleaded a general denial.

The district judge, after examining the case on these pleadings, was of opinion the plaintiff could not compel a compliance with his demand.

Judgment dismissing the suit being rendered against the plaintiff, he appealed.

*Hennen*, for the plaintiff and appellant.

1. The only question in this case is, whether the security bond of plaintiff can be cancelled, on showing that his account and official acts, as cashier, have been examined and found correct by the bank.

2. The plaintiff has an interest for himself and the sureties that his bond should be cancelled and returned, in order that his sureties be released. This interest gives him the right to demand it of the bank.

3. There is no cause shown to the contrary. His account is correct, his official acts and conduct have been approved, and his contract under the bond performed. The bond is, therefore, null and void as respects the purposes for which it was given, and the bank should not withhold it.

*De Armas*, contra.

1. The bond is the property of the bank, and they have a right to hold it for their further security.

2. Although nothing has occurred in the conduct of the plaintiff, as cashier, which can be imputed to him as incorrect, yet, hereafter, reasons might arise which would render him responsible.

*Martin, J.*, delivered the opinion of the court.

This is an application to cancel a security bond. The plaintiff having been appointed cashier of the City Bank of New-Orleans, gave his bond, according to the requisitions of the charter, for the faithful discharge of the duties of his office. Three years ago he resigned his office. He now seeks, in this suit, to have his bond cancelled, on an allegation that it appears from the books of the bank, that all his accounts have been examined and found correct, and that he surrendered to his successor every thing he had in his possession as cashier. The District Court dismissed his petition. From this judgment he has appealed to this court.

The judge of the District Court came to the conclusion, and we think correctly, that he could not legally compel the bank to surrender the evidence of the obligation of the sureties

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CLIQUE  
vs.  
CITY BANK.

A bank or other institution taking a security bond from its cashier or other officer, cannot be compelled to cancel and surrender it to the maker, on his resignation and settlement of his accounts, even when they are found correct, and the effects, money and all belonging to the office, are delivered over to his successor.

The bank may hold the security bond of its cashier, after his resignation and the settlement of his accounts, as an indemnity, should it be afterwards discovered that his conduct, while in office, had occasioned any injury to the institution.

## CASES IN THE SUPREME COURT

EASTERN DIST.  
March, 1835.

VAIRIN & REEL

vs.  
HOBSON & CO.

The prescription of three years lapsing after his resignation, does not extinguish the obligation of a cashier's bond; and, until it is prescribed against, the bank may hold the bond as an indemnity.

of the plaintiff, taken to indemnify it, should it thereafter be discovered that the conduct of the plaintiff had occasioned any injury to the institution.

It would be, indeed, very desirable for him to be able to relieve his friends from the responsibility they have incurred for him. But those who direct the affairs of the bank are bound to protect the rights of those who have confided in them. Three years only have elapsed since the plaintiff's resignation. Prescription cannot be said to have extinguished the obligation of which his bond is the evidence. At what period this may be the case, is a question to be examined when it will be presented for the consideration and decision of this court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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VAIRIN & REEL vs. HOBSON & CO.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The owner of a check, payable to bearer on a bank in New-Orleans, at sight, for six hundred and fifty dollars and forty three cents, having lost it by accident, it was sold at St. Louis, fifteen hundred miles from the place of payment, twenty-five days after date, by a passenger in a steam-boat, to a merchant who went from New-Orleans, for its full value in goods and money, and the latter sold it to the plaintiffs at five per cent. discount, who sued the drawers: Held, that the circumstances under which the check came into the possession of the plaintiffs were so suspicious that a person of ordinary prudence ought to have hesitated and examined further before buying, and that no recovery can be had on the check under such circumstances.

This is an action by the holders, to recover from the defendants as drawers, the amount of a check payable to bearer, on the Union Bank of Louisiana, for six hundred and fifty dollars forty-three cents, dated July 14th, 1834.

The defendants pleaded the general issue, and that the check was given to a customer who lost it, and received another in its place, which was paid; that the loss was duly advertised; that the plaintiffs received it long after its date, loss and advertisement, under suspicious circumstances and without a good and valuable consideration.

EASTERN Distr.  
March, 1835.

VAIRIN & REIL  
vs.  
HOBSON & CO.

The evidence showed that Calvin T. Maynard, a respectable merchant of New-Orleans, went passenger in the steamboat Clairborne, to St. Louis, which left New-Orleans the 14th July, 1834, the date of the check sued on. That one Bromley was on the same boat. After their arrival in St. Louis, about the 7th or 10th of August, he was informed by a person that Bromley had the check in question, and that as he (Maynard) was returning to New-Orleans soon, it might suit him to buy it. The check was handed to him at the hotel where he boarded, by a young man in Bromley's presence. He told Bromley if he would take goods he would buy it. Bromley agreed to take three hundred and ninety-four dollars in goods and the balance in cash, which was given for the check.

Maynard had become acquainted with Bromley on the passage up the river, and on being asked if "there was any thing in the appearance of Bromley which indicated him as being a man of bad conduct or morals?" says he was frolicksome on the voyage, but was considered as an honest man. Maynard showed the check to several persons in St. Louis before he traded for it, and they were of opinion the signatures were genuine. No suspicions were entertained of the check having been improperly obtained, or that it had been lost by its real owner. He did not see any advertisement of the check as having been lost, until after it had been presented to the drawers in New-Orleans.

Maynard sold the check at a discount of five per cent. to one of the plaintiffs, at St. Louis, who purchased it for the

EASTERN DIST. purpose of being remitted to New-Orleans. The discount  
*March, 1835.* was admitted to be rather higher than usual for drafts at  
TAIRIN & REEL sight. Plaintiffs offered to take the check at two per cent.  
MONSON & CO. discount with the endorsement of Maynard, but finally  
agreed to take it at five per cent. and run all risks.

Osborne, a witness for the plaintiffs, says he resides in New-Orleans, but went to St. Louis at the time Bromley did, and put up with him at the same hotel. Bromley told him he had received the check from the captain of an English vessel for some gold sovereigns which had been sent to him from England. That the captain preferred keeping the sovereigns, and had given him a check on his merchants, which he supposed was good. That he had been disappointed in a love affair, and had left New-Orleans in such confusion that he had forgot to draw the money out of the bank on his check. This confusion was occasioned by intoxication, having drank freely to drown his disappointment. Witness believed at the time, and still believes, that from the general appearance and manners of Bromley, that he came honestly by the check in question. He states on his cross-examination, that it is not usual for persons going to St. Louis, to take checks payable in New-Orleans. It is not usual for checks, payable at such a distance, to be passed off in trade. The defendants are an English house, doing business in New-Orleans.

The plaintiffs admitted the loss of the check, its advertisement, and second check of same amount, paid on the supposition that the first was lost, and that plaintiffs came into possession of it after loss and advertisement.

The district judge was of opinion that the circumstances under which the check was accounted for and negotiated to the plaintiffs, through Maynard from Bromley, did not authorise a recovery.

Judgment was rendered in favor of the defendants. The plaintiffs appealed.

Carter, for the plaintiffs.

*Benjamin*, for the defendants, contended that the evidence clearly showed the check sued on came into the plaintiffs' possession under suspicious circumstances, which ought not to entitle them to recover. The decision of the district judge is supported by the law of the case, and should be affirmed.

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March, 1835.

VAIRIN & REE  
vs.  
HOBSON & CO.

*Mathews, J.*, delivered the opinion of the court.

The plaintiffs sue as holders (*bonâ fide* and for a valuable consideration) of a check, drawn by the defendants, on the Union Bank of Louisiana, and made payable to bearer. Judgment was rendered by the court below in favor of the latter, from which the former appealed.

It appears by the facts admitted and the evidence of the case, that the check was lost by the person to whom it was first delivered, and who was the real owner, and its loss advertised, &c. It bears date on the 14th of July, 1834, and was not heard of from that period until about the 10th of August, when it was purchased by a certain Calvin T. Maynard, from one Bromley, who was at that time in possession of it, pretending to be a *bonâ fide* holder. Maynard afterwards sold it to the present plaintiffs, who caused it to be presented to the bank for payment, on the 25th of the month last mentioned, which was refused. The drawers, some time between the 14th of July and the 25th of August, had given another or a duplicate check for the same amount to the person to whom they had delivered the one now in question, on the supposition that it had been irrecoverably lost. Maynard, the immediate transferee to the plaintiffs, is made a competent witness by a release from liability executed by them. By his testimony it is shown that he went on a voyage and carried with him goods for sale, from New-Orleans to St. Louis, in the state of Missouri, in the steam-boat Claiborne, which left on the 14th of July, (the date of the check) and arrived at St. Louis on the 24th or 25th of that month. Bromley went passenger with him, and he certainly does not describe the conduct of his fellow passenger to have been such, during the voyage, as ought to have impressed any man of ordinary judgment and observation.

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HOBSON & CO.

favorably towards him, as a person of moral and industrious habits. Soon after their arrival, however, they traded in relation to the check now sued on, and the witness became the purchaser from Bromley, paying rather more than one-half the amount in merchandise, at *a good profit*, and the balance in cash. He soon after transferred it to the plaintiffs, at a discount of five per cent., they paying money for it, &c.

This negotiation was made by the plaintiff, Reel, for the use and benefit of the partnership, who was informed by Maynard of the circumstances under which he had acquired the check.

It results from the whole evidence and admissions of the case that Bromley had no title to this check, and was not a holder in good faith. Having no right to it, he could transfer none, according to a general rule of common sense and of law, that a person cannot give or transfer to another what he has not himself. But in relation to negotiable paper, such as bills of exchange, promissory notes and checks, an exception to this rule prevails in most if not all commercial countries of modern times, according to which purchasers and holders of instruments of this kind may obtain a valid title against the real proprietor from a holder *non domino*. This exception, which is evidently a violation of right, was introduced in aid of trade and commerce now so much carried on by means of credit and a paper medium, and under proper restrictions should be maintained. But when it ought to operate in full power, and when it should merge in the general rule, are questions which must be left, in a great degree, to the discretion of courts of justice, according to the circumstances of each particular case.

In cases relating to bills of exchange, negotiable notes and checks, when they have been stolen or lost, and have been transferred by the thief or finder to another person, the principal questions touching the right acquired by the latter, are 1st, whether the bill, note or check was over due at the time of transfer; 2d, whether the holder paid for it a valuable consideration and took it *bonâ fide*.

In the first of these hypotheses the party taking an instrument of this kind can have no better title to it than the party from whom he takes it; consequently he cannot recover on it, should it be shown that it had been previously lost or stolen.

As to the second question, it has been ruled by late decisions in the tribunals of England, that the payment of a valuable consideration, for a negotiable note, bill or instrument is not alone sufficient evidence of good faith and fair dealing in the purchaser of such an instrument, when it has been lost or stolen. In addition to this fact, he must show that due diligence was used by him to ascertain the character and standing of the person who offers it for sale or discount. He must examine into probabilities as to the means by which the immediate holder got possession, and if there exist any circumstances in relation to the manner of bringing a paper of this nature into market, calculated to raise suspicions in the mind of a man of ordinary prudence and discretion, the purchaser or acquirer, although for a valuable consideration, will obtain no better title than that which his immediate transferror had. In the cases of *Gill vs. Cubits et al.* and *Down vs. Halling et al.*, reported in 3 and 4 *Barn. and Cress.*, pp. 466 and 339.

The principles recognised in these decisions we believe to be reasonable and just, when the vendor is unknown to the purchaser, &c., and imposes no improper restraints, calculated to impede a fair and honest circulation of negotiable paper, in furtherance of trade and commerce.

If the present case be tested by them the plaintiffs must fail in their action. We shall consider them as standing in a position no better than Maynard would hold, were he plaintiff; because when he sold to them the check in question, he stated to Reel, the partner with whom he negotiated, the circumstances under which he had taken it. Let us examine them: His acquaintance with Bromley, from whom he purchased the check, was made during their voyage from New-Orleans to St. Louis. Bromley was frequently intoxicated during the voyage, and intimated to one of the witnesses in the

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VAIRIN & REEL  
vs.  
MONSON & CO.

The owner of a check, payable to bearer, on a bank in New-Orleans, at sight, for six hundred and fifty dollars and forty-three cents, having lost it by accident, it was sold at St. Louis, fifteen hundred miles from the place of payment, twenty-five days after date, by a passenger in a steam-boat, to a merchant who went from New-Orleans, for its full value in goods and money, and the latter sold it to the plaintiffs at five per cent. discount, who sued the drawers: Held, that the circumstances under which the check came in the possession of the plaintiffs, were so suspicious, that a person of ordinary prudence ought to have hesitated and examined further before buying, and that no recovery can be had on the check, under such circumstances.

EASTERN DIST. cause, that he was so much so when he left the city, that he  
March, 1835. forgot to present the check, which he carried with him to  
VAIRIN & REEL St. Louis, to the bank, for payment. The account he gave  
<sup>to.</sup>  
HOBSON & CO. of himself was ludicrous: he had been an assistant school-  
master for some time in New-Orleans, was disappointed in a  
love affair, and to kill the pain of unrequited love, betook  
himself to intoxicating drafts, &c. The check in question he  
had taken for gold sovereigns, sent to him from England,  
(this was done in order to oblige the captain of the vessel  
who brought them,) and instead of presenting it for payment,  
carried it with him and offered it for sale in St. Louis, about  
fifteen hundred miles from the place where it was payable;  
and there it proved to be worth five per cent less than its  
nominal value, &c.

Now, it appears to us that there is some thing so ridiculous  
in his story, and so absurd in the conduct of this man, that  
any person of ordinary prudence ought to have hesitated and  
examined further before buying under such circumstances,  
a paper of this description, and from one who may be said, in  
a commercial point of view, to have been wholly unknown  
to the purchaser. Technically speaking, the present holders  
and plaintiffs did not acquire the check in question free from  
imputation of *mala fides*. But, laying this consideration  
aside, was it not over due? It is true, that no time was  
designated for payment: checks are, however, generally  
intended for immediate payment, and not for circulation; and  
when they are held over for an unusual time, and then  
transferred, they may be considered in the same light as bills  
taken after they are due; and, considered in this light, the  
case is clearly with the defendants. See the case cited  
from *4 Barn and Cress.*

It is, therefore, ordered, adjudged and decreed, that the  
judgment of the District Court be affirmed, with costs, &c.

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March, 1835.

GARLAND & OS-  
BURN  
vs.  
GRINNELL ET AL.

GARLAND & OSBURN VS. GRINNELL ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT

The creditor who obtains a judgment in attachment, has the right to cause so much of the property attached to be sold, as will satisfy his judgment. No other creditor has a right to interfere between him and their common debtor, without showing, at least, an equal or better right.

An attaching creditor of the same common debtor, whose suit is not decided, and his demand still *sub judice*, cannot intervene and impede the execution of the judgment creditor, and require the funds attached in the two cases to be equally distributed between them.

In relation to legal proceedings against debtors not known to be insolvent, no distinction exists between suits prosecuted in the ordinary way, and by attachment. An intervention of other attaching creditors before or after judgment will be dismissed.

This case commenced by a rule taken by Garland & Osburn, attaching creditors of W. P. Grinnell, during the pendency of their suit, on Grinnell, Minturn & Co., *judgment* creditors by attachment of the same defendant, and who were proceeding to execute their judgment on the property attached, to show cause why the funds attached in the two cases should not remain in the hands of the garnishees for equal distribution.

The evidence showed that when the rule was taken, Grinnell, Minturn & Co. attached the property of W. P. Grinnell, an absent defendant, and had obtained a judgment which they were proceeding to execute.

Garland & Osburn had levied an attachment on the same property, but their suit had not ripened into a judgment.

The property attached in the two cases, consisted of goods, notes and money in the hands of garnishees.

The district judge, on hearing the parties on the rule, considered the property as in the custody of the court, and by analogy to the provision of the *Code of Practice*, article 301,

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the equity of which particularly applied to the case of a non-resident debtor, to distribute the property according to rank and privilege, viz: equally among ordinary creditors, such as the parties contending in this case.

It was ordered that the costs in the two suits be first retained and paid out of the funds attached, and that the remainder be divided into shares according to the claims of the attaching creditors; that the judgment creditor receive his portion forthwith: the court reserving the power to make a supplemental decree as to the remainder.

From this decree, Grinnell, Minturn & Co. appealed.

*Hennen*, for the plaintiffs, contended that the property attached in these cases, was liable in co-equal proportions to the two attaching creditors, and that the prior attaching creditor had his privilege over a subsequent one on the same property. There are no privileges but those created by the code. The property of the debtor is the common pledge of his creditors. *Louisiana Code, article 3152, 3150.*

*Carleton & Lockett*, contra, for the appellant.

1. The law is settled that the first attaching creditor shall be paid in preference to all others. Creditors are never paid in concurrence, except in cases of insolvency. *8 Martin's Reports, 511. 1 Louisiana Reports, 431, 432. 3 Ibid. 183.*

2. The record shows that the appellants had levied their attachment. The vigilant and industrious are ever first rewarded. *Vigilantibus et non dormientibus legis subveniunt.*

3. In Massachusetts and New York the second attaching creditor is made to delay proceedings until the first in judgment is satisfied. The first attachment is ever preferred to the United States for claims for duties on imports. *7 Mass. Reports, 76. 5 Pickering, 122.*

*Bullard, J.*, delivered the opinion of the court.

In this case it appears that Grinnell, Minturn & Co. having sued the defendant Grinnell by attachment, and obtained a judgment, were impeded in the execution of it by

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Garland & Osburn, other attaching creditors, whose suit is yet pending, and who obtained from the District Court, a rule on them to show cause why the funds attached, in the two cases, should not remain deposited in the hands of the garnishees for equal distribution, in satisfaction of the claims of the attaching creditors.

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BURN  
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After argument, the court ordered that the amount of actual and probable costs in these suits, be first paid and retained ; that the balance of the proceeds of the property attached in this case, be divided into shares, according to the claims of the attaching creditors ; that the judgment creditor receive his proportion forthwith, the court reserving the power to make a supplemental decree, as circumstances may require.

From this decree the judgment creditors appealed.

Article 265 of the Code of Practice, gives to the creditor who has obtained a judgment in attachment, the right to cause so much of the property attached to be sold, as will suffice to satisfy his judgment. As soon as the judgment is signed, it becomes his property, and he has a right to proceed with the execution of it according to law, and no other creditor has a right to interfere between him and the common debtor, without showing at least an equal or a better right. In the case now before the court, the intervening creditors have no judgment, their demand is yet *sub judice*, and admitting that the mere levying of the attachment confers no privilege on either, it is not readily perceived how it can authorise one of them to arrest the progress of the other, in the pursuit of his rights. If both creditors had judgments, the question might fairly arise whether priority of attachment gives any preference. In the present case the reasoning of the counsel for the appellees is, in our opinion, fatal to the pretensions of his clients ; for if the attachment gives no preference or privilege, then both parties must stand before the court as if they were ordinary creditors ; the one with a judgment and the other without ; and it never has been pretended that the law requires all the creditors of a common debtor, not insolvent, to proceed *pari passu* in the prosecution of their claims

The creditor who obtains a judgment in attachment, has the right to cause so much of the property attached to be sold, as will satisfy his judgment. No other creditor has a right to interfere between him and their common debtor, without showing at least an equal or better right.

An attaching creditor of the same common debtor, whose suit is not decided, and his demand still *sub judice*, cannot intervene and impede the execution of the judgment creditor, and require the funds attached in the two cases to be equally distributed between them.

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GARLAND & CO.

BURN  
vs.

GRINNELL ET AL.

on the admitted general maxim, that the property of the debtor is the common pledge of his creditors. Would any court interfere in the demand of an ordinary creditor to prevent a judgment creditor from recording his judgment so as to give it the effect of a judicial mortgage on the property of their common debtor? Would any court forbid the issuing of an execution under similar circumstances, because other suits were pending against the same person, not yet decided?

In relation to legal proceedings against debtors not known to be insolvent, no distinction exists between suits prosecuted in the ordinary way, and by attachment. An intervention of other attaching creditors, before or after judgment, will be dismissed.

In the case of Gasquet & Co. vs. Johnson et al., this court held, that in relation to legal proceedings against debtors not known to be insolvent, no sound distinction exists between suits prosecuted in the ordinary mode, by citation, and those which are pursued by attachment. In that case all intervention of other attaching creditors, before judgment, was dismissed. In this case the interference took place after judgment. *1 Louisiana Reports, 425.*

It will be readily perceived from the foregoing remarks, that we consider the fallacy of the reasoning on the part of the appellees, and which appears to have been adopted by the court, to consist in supposing that the case presented was one in which the court was called on to make a distribution among concurring creditors; but, in fact, only one creditor presented any claim to be paid out of the property of the defendant. He had a judgment, and the opposing creditors have not yet shown, even as against the debtor himself, any right to have his property sold to satisfy their claims. We are, therefore, of opinion that the court erred in making a provisional distribution of the property attached, in such a way as to curtail the rights of the appellants, to be paid the amount of their judgments out of the property of the defendant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed: that the rule be discharged at the cost of the appellees, and that they pay the costs of this appeal.

## OF THE STATE OF LOUISIANA.

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March, 1835.

ROBERTSON  
ET AL.  
VS.  
PENN.

ROBERTSON ET AL. VS. PENN.

APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT, THE  
JUDGE THEREOF PRESIDING.

A statement of facts, made out by the judge, will be deemed sufficient to enable the court to examine the case on its merits, when there is no other objection than the *refusal* of the appellee's counsel to consent to it. Where a party, whose execution is enjoined in the sheriff's hands, puts in an answer, praying for a dissolution of the injunction, *with damages*, and for judgment against the principal, and surety on the injunction bond, for the original debt, which was dissolved with costs, but no damages, and the judgment acquiesced in : *Held*, that in another suit on the bond against the surety, the party can recover only such damages as he may prove, independently of the interest and damages given by statute, when the former judgment is set up as a bar to the action. The question of damages will be left to the jury.

This is an action on an injunction bond, against the defendant, as surety. The plaintiffs allege they obtained an order of seizure and sale against one Isaac Lazarus, in the parish of St. Tammany, on a debt due them of three hundred and fifty-seven dollars fifty cents. That one M. R. Isaacson, residing in Philadelphia, obtained an injunction, claiming the goods seized under said order of seizure, and stopped the sale of them. He gave an injunction bond with the defendant as his surety, in the penalty of fifteen hundred dollars. The injunction was dissolved, and the proceeds of the goods nearly all wasted and expended in costs and litigation, and in the mean time the original debtor left the state. The plaintiffs further allege that by the wrongful suing out of the injunction, they have been deprived of the means of making their original debt; by reason of the premises, they have sustained fifteen hundred dollars in damages, for which they pray judgment against the defendant on his bond.

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ET AL.  
vs.  
PENX.

The defendant pleaded a general denial. He denied specially that he is liable under said bond, as Isaacson was a third party, whose rights were invaded by the seizure of the goods; and although the injunction was dissolved, the party was only liable under the statute, for such damages as the court might award. That he cannot, in any event, be made liable until the principal in the bond is prosecuted to insolvency. And further, that the plaintiffs suffered no damage, not having seized sufficient property to satisfy their claim; and by mismanagement, suffered the defendant in the writ to sell thousands of dollars after the seizure, which they could with diligence have prevented, and made their money.

The defendant set up a demand of one hundred dollars in damages for counsel fees, which he has had to pay in consequence of being harassed with this suit, and prays judgment in reconvention for this sum.

The evidence showed, that on the 28th of March, 1832, the present plaintiffs obtained an order of seizure and sale against Lazarus, on a judgment which had been previously rendered against him in Alabama. The sheriff seized eighty sacks of salt and seven boxes of hats. One M. R. Isaacson, of Philadelphia, intervened in the seizure and filed his injunction bond by Lazarus, his attorney in fact, and signed by the defendant as surety in the penal sum of fifteen hundred dollars. On this bond an injunction was obtained against the *sheriff alone*, enjoining him from further proceedings.

The present plaintiffs intervened in this injunction, praying to be made parties and for the dissolution of the injunction, with damages. In October, 1832, they discontinued their intervention, with the leave of the court, and the cause was continued until the next term. The sheriff answered, denying any liability and praying for a dissolution of the injunction. The parties also agreed that the property seized might be sold in the mean time, and the proceeds held subject to the judgment of the court. The goods were sold accordingly, for three hundred and forty-four dollars twenty-eight cents, which, after deducting costs and expenses, left a

net balance of two hundred and seventy dollars forty-one cents. On the 11th April, 1833, the injunction was dissolved, Lazarus was in possession of several thousand dollars worth of goods in the same situation of those seized; but before the dissolution of the injunction, he left the state. The attorney of the present plaintiffs defended the injunction suit against the sheriff and obtained its dissolution. The sheriff stated when he made the seizure, the defendant, Lazarus, was in possession of plenty other goods, at the time and for a month afterwards, to have paid the plaintiff's debt, but kept on selling, and when the injunction was dissolved he had left the state without leaving any property. The deputy sheriff stated, that when the seizure was made he thought they had seized goods sufficient, but some of the boxes were less valuable than was expected.

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PEENE.

Upon these pleadings and testimony the parties went to trial. The cause was submitted to a jury, who returned a verdict for the defendant. After an unsuccessful attempt to obtain a new trial, the plaintiffs appealed.

The statement of facts was referred to the judge, who made it out, but the counsel for the defendant endorsed on it, that he refused his consent to it.

*Davidson*, for the defendant and appellee, moved to dismiss the appeal, on the ground that there was no statement of facts.

*Flower and Jones*, for the plaintiff.

1. The sheriff seized property sufficient to satisfy the plaintiff's demand in the first instance, but by the wrongful suing out of the injunction, the money was not made.

2. The evidence shows, the sheriff thought he had seized goods sufficient to satisfy the order of seizure, but was mistaken in the value of some boxes. This shows he acted with diligence, and but for the injunction would have made the money.

3. Had the sheriff seized double as many goods as he did, the injunction would have covered all, as all the goods were in the same situation.

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4. The evidence shows, the debtor continued in possession, and to sell his goods, for two months after the seizure was made, but the sheriff was deterred from any further seizure, as more damages would be claimed.

5. The plaintiff is entitled to damages to the full amount of his loss, on the wrongful suing out the injunction, for which the defendant is liable.

*Bullard, J.*, delivered the opinion of the court.

A statement of facts, made out by the judge, will be deemed sufficient to enable the court to examine the case on its merits, when there is no other objection, than the *refusal* of the appellee's counsel to consent to it.

The appellee moves to dismiss this appeal, for want of a statement of facts. The record shows, that before the appeal was granted, the judge certified a statement of the facts proved on the trial, which appears to have been previously submitted to the opposite party, but to which he refused his assent. Under the article 603 of the Code of Practice, we are of opinion, this is sufficient to authorise this court to examine the case on its merits.

The defendant and appellee is sued as surety on an injunction bond, and the plaintiffs allege special damage, consequent on the wrongful issuing of the injunction. The case was tried by a jury, whose verdict was in favor of the defendant, and the plaintiffs appealed.

It appears that the present plaintiffs, in the suit of injunction, put in an answer, praying for a dissolution of the injunction, and for judgment against the principal and surety on the bond, in reconvention for the amount of the original judgment against Lazarus, and for twenty per cent. damages. The injunction was dissolved, with costs, but no damages are added, according to the provisions of the statute. *Session Acts of 1831, 102, sec. 3.*

Where a party whose execution is enjoined in the sheriff's hands, puts in an answer, praying for dissolution of the injunction, with damages, and for judgment against the principal and surety on the injunction bond, for the original debt, which was dissolved with costs but no damages, and the judgment acquiesced in: Held, that in another suit on the bond against the surety, the party can recover only such damages as he may prove independently of the

In this judgment the parties appear to have acquiesced. The answer in the present case sets up substantially the former judgment as a bar to the present action, and alleges that the party is entitled, under the statute, only to such damages as the court might award when the injunction was dissolved.

Whether, as it relates to the surety, an action can be maintained on the bond, distinct from the one in which it

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was given, and in which, under the statute, the court is bound to pronounce on the penalty, may be well questioned. Be that, however, as it may, we are clearly of opinion, that in this suit the plaintiff can recover only such damages as he may prove, independently of the interest and damages to which he might be entitled, under the provisions of the statute. The question of damages was left to the jury, and we find nothing in the evidence to authorise us to reverse their finding.

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ages will be left  
to the jury.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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### MARIATIGUI, KNIGHT & CO. vs. LOUISIANA INSURANCE CO.

#### APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where acts of barratry of the master and mariners were committed, by smuggling on board articles prohibited by the revenue laws, and which were seized on the landing of the vessel, but she is not seized until more than twenty-four hours after landing at her port of destination: Held, that the insurers were not liable for the *barratry*, although insured against, when, according to the terms of the policy, the vessel was moored *twenty-four hours in good safety*, before seizure.

Although the loss of the vessel was the immediate consequence of seizure, the remote cause of which was the *barratry* of the master and mariners, the effects of which were insured against, yet, as no loss resulted until after the vessel had been moored twenty-four hours, *before seizure*, she may be considered as in safety, *quo ad* the responsibility assumed by the insurers.

Mooring in good safety, is defined to be the placing a vessel in a situation to unload her cargo: no loss of the vessel prevented the landing of any

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goods on board, except those smuggled. It is the loss for which the insurers promised indemnity, which was neither *inchoate* or *final* by any proceeding directly touching the vessel, prior to her being moored twenty-four hours in safety.

This is an action to recover six thousand dollars from the defendants, being the amount of insurance effected on the brig Primero de Mahon, belonging to the plaintiffs and insured in the office of the Louisiana Insurance Company, at and from Havana, to New-Orleans, and seized and forfeited in the latter port, on account of the barratry of the captain and mariners, in introducing rum in demijohns and Spanish segars in boxes, in violation of the revenue laws.

The plaintiffs reside and transact commercial business in Havana, and were the owners of the Spanish brig Primero de Mahon. On the 14th of August, 1832, W. W. Caldwell, a member of the plaintiff's firm, took out a policy of insurance, at the office of the defendants, on said vessel, which was valued at six thousand dollars, and insured "at and from the port of New-Orleans to Havana, and *at and from Havana to New-Orleans, until she be moored twenty-four hours in good safety.*" The insurance was against the perils of the seas, *barratry of the master and mariners, &c.* The brig sailed under Spanish colors. On her return voyage, and *within* twenty-four hours after she landed at the port of New-Orleans, there was discovered and concealed in her, a quantity of demijohns of rum, and Spanish segars in boxes, which were immediately seized by the custom-house officers. The vessel arrived in port on the evening of the 12th of September, 1832, and had on board twelve demijohns of rum and two hundred and forty boxes of Spanish segars, belonging to the boatswain, with the knowledge of the other officers. These articles were seized immediately, and on the 15th of September the vessel was seized and finally condemned for having smuggled in the rum and segars, in violation of the revenue laws.

The district judge considered the law as settled, which must govern this case. The rule is established that the insurer is not liable for a *loss* which occurs after the expi-

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ration of twenty-four hours safe mooring in the port of her destination, even though she may have received her death wound previously, and during the time she was insured.

Judgment was rendered in favor of the defendants. The plaintiffs appealed.

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*Maybin and Hennen*, for the plaintiffs, contended, that the brig Primero de Mahon was libelled by the United States, within twenty-four hours after she was moored at the levee. What constitutes a mooring? See *Webster's Dictionary, verbo Mooring*. 15 *Common Law Reports*, 162. 5 *Martin, N. S.* 637.

2. That if she was not so libelled, the smuggling was discovered by the officers of the customs almost immediately on her arrival, within two hours at the farthest, and before she was hauled to the levee, and the goods were seized by the officers, and the vessel was therefore immediately forfeited to the United States, and the ownership of the plaintiffs divested 8 *Cranch*, 398, 417. 3 *Wheaton*, 311. 11 *Johnson*, 293.

3. By the act of Congress, March 2d, 1799, section 103, the vessel is forfeited in which the prohibited goods shall be imported. There was clearly an importation in this case. 1 *Mason*, 482. 1 *Peters's C. C. Reports*, 256. 1 *Gallison*, 206, 239, 348, 365. 9 *Cranch*, 104.

4. The case in 1 *Term Reports*, 252, of *Lockyer vs. Offley*, was not decided by *Lord Mansfield*, but by the three judges of the King's Bench, and is distinguishable by its circumstances from the present. It is founded on no authority but the case of *Meretonz vs. Dunlope*, which is questioned by Chief Justice Tilghman. See 3 *Sergeant and Rawle*, 21.

5. The principle upon which this case rests is shaken, if not opposed, by several adjudged cases in the United States. See *Massachusetts Reports*, 1. 3 *Johnson's Reports*, 16. *Pickering's Cases*, 210. 2 *East*, 110. 15 *Ibid.*, 45.

*Strawbridge, contra.*

*Mathews, J.*, delivered the opinion of the court.

In this case the plaintiffs claim six thousand dollars, an amount which is alleged to have been insured on the brig

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Primer de Mahon, by the defendants. Judgment was rendered in favor of the latter, in the court below, from which the former appealed.

The principal facts requiring notice in the decision of the case, as disclosed by the pleadings and evidence, are the following: The insurance was effected on the vessel at and from New-Orleans to Havana, and at and from the latter place to New-Orleans, and until she be moored twenty-four hours in good safety. Amongst other risks assumed by the insurers, was that of barratry which might be com-

mitted by the master and mariners, &c. Acts of barratry were committed by the master or mariners, in attempting to smuggle into the latter port certain demijohns of rum and boxes of segars, (in violation of the revenue laws of the United States,) which were seized by the officers of the custom-house, immediately on the arrival of the brig, late in the day, on the 12th of September, 1832. But the vessel was not seized until the 15th of that month, and not until after she had been moored more than twenty-four hours.

The correctness of the judgment rendered by the court below, depends solely on a solution of the question, whether the vessel, under all the circumstances attendant on her arrival and mooring, must be considered as having remained in safety from the period when she was moored until actual seizure by the marshal, under process instituted at the instance of the collector of the port, or at least during twenty-four hours after mooring.

It is clear from the evidence, that acts of barratry sufficient to cause a forfeiture had been committed, and were known to have been committed previous to the time at which this risk had ceased, as assumed in the policy of insurance.

A legal consequence of the barratrous conduct of the master, in a prosecution to that effect, was the condemnation and forfeiture of the vessel; and that such prosecution would take place, was rendered in a very high degree probable, from the circumstance of the act of smuggling being known to the custom-house officers so immediately after the arrival

of the brig. The loss of the vessel was, however, the immediate consequence of its seizure and condemnation. It is true, the remote cause of loss was the barratry of the master, against the effects of which the owners were insured ; but it produced no effect which may be considered as resulting in loss, until after the vessel had been moored more than twenty-four hours ; and before actual seizure she may be considered as having been in safety, *quo ad* the responsibility assumed by the insurers in their policy. Mooring in good safety, is defined to be the placing of a vessel in a situation to unload her cargo ; and this, as shown by the evidence, was the situation of the brig in question, for as no forfeiture attached to any of the goods on board, except those smuggled, there was nothing to prevent them from being landed. It is the loss for which the insurers promised indemnity ; and it was neither *inchoate* nor *final* by any proceeding directly touching the brig, prior to her being moored twenty-four hours ; and immediately after that period the contract of insurance had expired by its own limitation, as no contract then existed covering the property ; for the owners *res perit domino.*

These principles are supported by the decision of the Court of King's Bench in England, in the case of *Lockyer et al. vs. Offley*, 1 *T. R.* 252, and the doctrine therein established has been transcribed into authors on insurance. See *Hughes*, pp. 190, 191. *Marshal*, 533. 3d *Kent's Com.*, 253, et al.

But it is contended for the plaintiffs, that the doctrine established by the case cited from 1 *Term Reports*, has been overruled by subsequent decisions, in proof of which we have been referred to a variety of cases decided both in the courts of England and the United States. See 2 *East*, 109. 15 *do.*, 45. 15 *Common Law Reports*, 160. 3 *Johnson's Law R.* 16. 11 *Johnston*, 293. 7 *Cranch*, 398 and 417. 3 *Wheaton*, 311, &c.

The decisions in most of these cases, were made in reference to losses occasioned by physical causes, which had effected the inevitable destruction of the property insured, within the time limited in the policies. The judgments in these cases

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do not, in our opinion, conflict with the principles laid down in that of Lockyer et al. *vs.* Offley, either in what was said or done, touching the facts and law of those cases. There is, however, another class of cases cited, on which the counsel for the appellants rely; and these cause some embarrassment in the decision of the present. They have relation to the doctrine of forfeiture, as inflicted on owners of vessels in consequence of violations done to public policy and order, by contravening the provisions of prohibition laws. The laws which governed in those cases, were denominated non-intercourse acts, passed by the Congress of the United States, and the expression used by which the forfeiture was ordained is, that the vessel *should be forfeited*. The expression in the revenue law, under which the brig in the present instance was condemned, is, *under pain of forfeiture*. Perhaps it would be difficult to draw any rational distinction by which the effects of these different modes of phraseology might be varied. In the decisions of the cases cited, the only question determined was one which affected directly the property of the owners, and it was declared that a transfer took place, immediately and *ipso facto*, by the commission of the offence, to the United States. This opinion must have been founded on a fiction of law contrary to general principles relating to the transfer of the dominion of property, which can only be complete by delivery, or perhaps, by seizure, in forced alienations. For the purpose of preventing frauds on the government, by simulated transfers to other persons, after violation of its laws, by the owners, whereby their property may have been forfeited, the fiction which carries back the change from the time of condemnation to the period of the offence, may be considered as wisely and properly adopted. But this section ought not to be allowed to operate on contracts entered into *bonâ fide* previous to the act by which a forfeiture may be incurred, when such contracts have reference only to the use or preservation of the thing, for the benefit of the owner. It must, however, be confessed, that the doctrine now assumed appears to militate against that acted on in the case of Fontain *vs.*

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Phoenix Insurance Company, (11 *Johnson*, 293.) But it is in strict conformity with the principles established by the decision of the case in 1 *Term Reports*, 252, wherein it was held that although a forfeiture may be considered as attaching at the moment the offence is committed, for some purposes; yet, in relation to a contract of insurance, the actual property is not altered until after seizure. A rule has grown out of this decision, which ever since seems to have been acquiesced in by all the authors who treat on the subject of insurance, in England and the United States, and remains (so far as we know) without exception, unless one may be found in the case cited from 11 *Johnson's Reports*.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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### CAMPBELL vs. HIS CREDITORS.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where the application to obtain an injunction was not legally made, yet when all the facts necessary to authorise it, are manifest by matters of record, it may be granted.

So, admitting the facts necessary to support the application for an injunction were not legally established, when it was granted; on a motion to dissolve, if from an inspection of the record it is evident to the court the applicant would be entitled to a new one, in case the first is dissolved, it will be sustained.

The insolvent debtor in this case, filed his petition and schedule, praying for a meeting of his creditors to deliberate on his affairs; that his property be accepted for his creditors

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by the judge, and in the meantime, that all proceedings against his person and property be stayed.

On the 31st May, 1833, the judge accepted the surrender of the debtor's property, and ordered a meeting of the creditors before the parish judge of the parish of Iberville, the 15th July following. Thomas E. Ives was appointed attorney for the absent creditors.

At the meeting of creditors, a majority in number and amount voted to sell the immoveable property of the ceding debtor, on a credit of one, two and three years, and elected Thomas E. Ives and John D. Bein syndics.

Spencer Gloyd and others, who are judgment creditors, opposed the proceedings of the creditors, in voting to sell the immoveable property on a credit of one, two and three years, when they had a right, as mortgaged and privileged creditors, to have it sold for cash. They further opposed the appointment of Thomas E. Ives as one of the syndics, on the ground that he was not eligible, he being appointed and having accepted the trust of attorney for the absent creditors. They pray that the proceedings of the meeting of creditors be set aside, and that sufficient of the property surrendered to pay their mortgage claims, be *sold for cash*, and that the appointment of Thomas E. Ives as one of the syndics, be annulled.

Upon the hearing of this part of the case, the court decreed that the opposition be overruled as relates to both branches. The counsel for the opponents took a bill of exceptions to the opinion of the court.

On the 31st of October, 1833, the opponents, by their counsel, filed a motion and application for a re-hearing of their opposition, which was on the 3d November after argument laid over, until the next or spring term of the court.

During the intervening time, the syndics advertised the property for sale, on the terms of credit voted by the creditors. On the 11th January, 1834, the opposing creditors obtained an injunction against the sale, on the grounds, that from the face of the papers it appeared one of the syndics was

ineligible, and that the opposing creditors had the right to have the sale made for cash, and that their opposition was undecided.

At the September term, 1834, of the Iberville court, the syndics moved to dissolve the injunction on the face of the petition. The motion was overruled, and from the judgment sustaining the injunction, the syndics appealed.

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*Stacy*, for the syndics and appellants, showed that the opposition of the mortgage creditors, who obtained this injunction, and the grounds upon which it was obtained, were overruled and finally decided on by the court, in its order made on the 31st October, 1833; the injunction was, therefore, improperly granted, and should have been dissolved on its face.

2. The order granting a re-hearing, and laying over the opposition to another term, after its final decision, was obtained *ex parte*, which no opposing creditor had the right to do, when it was reversing a previous decision and order of the court. This order was obtained without notice to the other creditors, and should have been disregarded. *7 Martin, N. S.*, 425.

3. The opposing and injunction creditors having only a general mortgage, resulting from the recording of their mortgages, had no right to demand a cash sale, if the majority of creditors, in number and amount, voted differently: such right belongs exclusively to creditors by special mortgage or privilege. *2 Moreau's Digest*, 429, sec 16. *Louisiana Code*, 2062.

4. The ground laid in the petition for the injunction, that the syndics had advertised the sale without a special order of court, is untenable; none was necessary, or is necessary in any case except where rights and credits are to be sold. *Acts of 1826*, sec. 3. See *Acts of 1817*, sec. 30.

5. Whatever causes might have existed, the present injunction was wrongfully and illegally obtained, and must be dissolved. It was obtained on the application and affidavit of the attorney at law of the parties. As attorney at law, he

EASTERN DIST. was incompetent to make the affidavit which must be made by the principal. *4 Mar. N. S.*, 355. *Code of Practice*, 304.  
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MIS-CREDITORS. 6. The affidavit was clearly illegal and null, because the evidence shows it was made on Sunday, which is not a legal day. The statement of facts shows it was made on Sunday, the 12th January, instead of Saturday the 11th, as it purports. *Code of Practice*, 207.

7. The affidavit was insufficient on its face: not a single fact is sworn to. It reads thus: "F. H. Davis, agent for the petitioners, being first duly sworn, says, that the facts and allegations in the foregoing petition, as of his own knowledge, are true, and that those as of the knowledge of others, he believes to be true; and that, according to his belief, an injunction, as prayed for, is necessary." Mr. Davis is also the attorney of record. The law requires the party to state, under oath, "the facts" which, according to his belief, render an injunction necessary. *Code of Practice*, 304.

*5 Louisiana Reports*, 50.

*Davis*, for the opposing creditors and appellees.

1. The injunction was rightfully obtained, and on legal grounds. The opposition of the mortgage creditors was always in time. It was kept open by the court, and the syndics had no right to proceed in the sale of the property until it was finally disposed of.

2. The necessity for the injunction is apparent on the face of the papers. For it is clear the opposing creditors had the right to force a sale for cash, and that one of the syndics is ineligible.

3. The syndics cannot sell unless by an order of court. The want of this prerequisite appears from the face of the papers.

4. The syndics having proceeded to sell the property without an order of court, and before the opposition was finally decided on, an injunction is shown, from the face of the papers, to be necessary. It could not be dissolved while this necessity existed. Damages having been disclaimed, there is no basis for even an appeal from the decision refusing to dissolve.

*Martin, J.*, delivered the opinion of the court.

Opposition having been made to the election of one of the syndics, and to the votes and proceedings of the creditors for the sale of the property ceded, the District Court, after acting on the first branch of the opposition, ordered that the second remain for consideration at the following term. Notwithstanding this order, the syndics advertised the property for sale. One of the creditors obtained an injunction to stay the sale until after the action of the court upon the opposition.

The syndics made an effort to have the injunction dissolved, and having failed, appealed to this court.

The appellants contend that the injunction was improperly granted, in the first instance, on the affidavit of the attorney at law of the applicant, who signs himself *attorney in fact*, but whose authority as such, is not shown.

As in the present case, all the facts necessary to authorise the injunction were manifest by matters of record, viz: the opposition to the vote of creditors for syndic the order of court postponing the consideration, and the question being still *sub judice*. The attempt of the syndics to sell before the court had acted on the opposition to the sale, is admitted by their effort to obtain the dissolution of the injunction.

Admitting that the facts necessary to support the application for an injunction, were not legally established at the judge's chambers, they were evident to the court on the motion to dissolve from the inspection of the record, and from the acts and conduct of the syndics. It was evident that if the court had been of opinion, on very technical grounds, indeed, that the injunction was not properly granted, the applicant had an undoubted right to a new one, on the dissolution of the former.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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Where the application to obtain an injunction was not legally made; yet when all the facts necessary to authorise it, are manifest by matters of record, it may be granted.

So, admitting the facts necessary to support the application for an injunction were not legally established, when it was granted, on a motion to dissolve, if from an inspection of the record it is evident to the court the applicant would be entitled to a new one, in case the first is dissolved, it will be sustained.

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March, 1835.

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vs.  
JUDGE WATTS.

## STATE vs. JUDGE WATTS.

## APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A *mandamus* will not issue to compel a district judge to sign a judgment after the lapse of three judicial days, when, even after that time, on the intervention of a creditor of one of the parties, suggesting fraud, the judge in the exercise of his discretion, has granted a new trial.

Whether a judge discreetly exercises his legal discretion in granting a new trial, in any case, is a question which cannot be entertained on an application for a *mandamus* to compel him to sign the judgment, upon which the new trial is granted; the error, if it be one, can only be corrected on appeal.

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The Supreme Court has powers commensurate with its appellate jurisdiction, but will not exercise a general supervisory control over the proceedings of the inferior tribunals. It can only interpose its authority when necessary for the exercise of its appellate jurisdiction.

This is the case of an application to the Supreme Court, for a *mandamus* to compel the judge of the first judicial district to sign a certain final judgment, rendered by him on the minutes.

The facts of the case are set forth in the following petition and affidavit, and the answer of the district judge to the rule requiring him to show cause why the *mandamus* should not be awarded:

*H. R. Denis*, of counsel for Seraphine Beclen, wife of A. Brou, being sworn, declares that on the 24th day of February, 1835, he obtained a judgment of separation of property for the wife against her husband, in the District Court of the first judicial district of Louisiana, liquidating her rights, amounting to thirty thousand and forty-five dollars.

That afterwards, on the 28th of February, when the said judgment was ripe and ready to be signed, René Trudeau,

under the pretence that he was a creditor of A. Brou, was admitted to file an intervention in said suit, and moved the court for a new trial between the original parties. That the judge of said court, instead of signing said judgment, as requested to do by this deponent, granted a new trial. That this deponent offered to go to trial, *instante*, which was refused.

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That on the 5th of March, this deponent, after giving notice to the intervening party, moved to be admitted to make his proof again in the original suit, and on being refused, again moved the judge to sign said judgment, which he also refused.

This deponent further declares, by the illegal conduct of the judge, in not signing her judgment, his client, sustains an irreparable injury, for this, that her husband is about to call a meeting of his creditors, in which case she will be deprived of the right of voting at the said meeting.

Wherefore, he prays that a *mandamus* issue from the Supreme Court, ordering the district judge to sign said judgment.

Upon the filing of this petition and affidavit the rule was taken on the district judge to show cause why he should not sign the said judgement. The judge returned for answer:

"That the petition of Seraphine Becnel, against her husband, A. Brou, reclaiming thirty thousand and forty-six dollars, for paraphernal rights against her husband, and a separation of property was filed on the 16th February, 1835.

"The defendant filed an answer, on the 18th February, 1835, submitting himself to the decree of the court.

"On the 24th February, 1835, plaintiff's counsel called up the case, as by consent, as he said, of defendant; but no consent was exhibited, nor was defendant present. The court, perhaps improperly, yielding to the suggestion of plaintiff's counsel, looked into the proofs; and considering that as to defendant, she was entitled to a judgment; and that, if questioned by creditors, she would again have to establish her claim contradictorily with them, thought her

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entitled to a judgment ; and one was rendered in her favor, on the 24th February, 1835. On the 28th February, 1835, that judgment was ripe for signature ; on that day, and before the judgment was signed, René Trudeau, filed an intervention, suggesting fraud, and praying a trial by jury, and moved for a new trial. This motion was taken up, by consent of parties, and the court, under the circumstances of the case granted a new trial, and directed the cause to be placed on the jury docket, to be called in course. Some days afterwards, but on what day in particular I do not remember, and there is nothing on the minutes to show, plaintiff's counsel moved to have the case tried, stating that he had given notice of his intention to try the case, to the counsel of Trudeau ; no proof of this fact was made to the court, and if there had been, the court would not have heard the case.

"The counsel for Mrs. Brou, insisted on his right to try the case under Code of Practice, art. 394. The undersigned considers that he could not proceed to try the case in the manner required by Mrs. Brou's counsel.

"1st. There was no consent of defendant, to this course apparent to the court.

"2nd. The court considers that the intervening party having asked a jury, and the cause being ordered to be placed on the jury docket, the whole case must be necessarily tried by jury, the court not considering it any injury to a party, under such circumstances, to impose a jury trial on him, and that notwithstanding Code of Practice, 394, the original parties cannot by their consent, take up a case out of its order on the docket, contrary to the rule, or to the prejudice of the right of the intervening party, to have his rights passed upon by a jury.

"Under these circumstances, the undersigned considers that he could neither sign the judgment rendered, (for a new trial had been granted, which annulled the judgment rendered) nor could he proceed to try the case by consent of plaintiff and defendant, out of its course, no consent appearing for defendant, and if such consent had appeared, the undersigned would still have refused.

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"The undersigned also considers that he is not bound to take up causes by consent, out of the ordinary course of business, when parties choose to make such application, although the undersigned frequently does so to facilitate business.

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STATE  
TO

JUDGE WATTS.

"Since the service of this rule, A. Brou has applied for, and obtained a stay of proceedings, and called a meeting of his creditors, to obtain a respite. This circumstance, it appears to the undersigned, restrains from further action in the case: all which is submitted as a reason why a *mandamus* should not issue, in conformity with the motion of the applicant."

*Bullard, J.*, delivered the opinion of the court.

The petitioner, S. Beenel, obtained from this court, a rule on the judge of the First Judicial District, to show cause why a *mandamus* should not issue, commanding him to sign a judgment rendered in her favor, against her husband on the 24th day of February, but which the judge had refused to sign, more than three days after its rendition.

The district judge, in answer to the rule, shows for cause, that on the 28th of that month, and before the judgment was signed, René Trudeau, a creditor of the husband, filed an intervention suggesting fraud, and moved for a new trial, by jury. That the case was taken up by consent, and that the court, under all the circumstances of the case, granted a new trial, and directed the cause to be set down on the jury docket, and has not yet been reached in its regular order.

This court is not called upon in the present case to decide whether an intervention can properly be admitted after trial, and judgment rendered. The case is not before us on appeal, and we express no opinion on that question. The application to us is to direct the district judge to sign a judgment rendered by him, unless he shows good cause why it should not be signed.

Article 546 of the Code of Practice, makes it the duty of the judge to sign all definitive or final judgments rendered by them, after three judicial days shall have expired

A *mandamus* will not issue to compel a district judge to sign a judgment after the lapse of three judicial days, when even after that time, on the intervention of a creditor of one of the parties suggesting fraud, the judge in the exercise of his discretion has granted a new trial.

Whether a judge discreetly exercises his legal discretion in granting a new

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trial in any case,  
is a question  
which cannot be  
entertained on  
an application  
for a *mandamus*,  
to compel him  
to sign the judg-  
ment upon which  
the new trial is  
granted. The  
error, if it be  
one, can only be  
corrected on ap-  
peal.

The Supreme Court has powers commensurate with its appellate jurisdiction, but will not exercise a general supervisory control over the proceedings of the inferior tribunals. It can only interpose its authority, when necessary for the exercise of its appellate jurisdiction.

Let the rule be discharged.

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vs.  
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### MORTEE vs. ROACH'S SYNDIC.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS, THE JUDGE OF THE CRIMINAL COURT PRESIDING,  
*ad interim.*

In a case of reciprocal obligations, the party who does not perform his part of the engagement, cannot avail himself of any rights resulting to him from the contract; consequently, the other party may demand its rescission.

In a reciprocal engagement resulting from the sale of certain slaves, where the purchaser becomes insolvent and surrenders the slaves with his other property, before payment of the price, he not being the absolute owner, his right to the property is defeasible, and the seller may have a rescission of the sale and compel the syndic, to restore possession of the property.

Property ceded, of which the insolvent debtor is not the absolute, but only the defeasible owner, and when this defeasible right is annihilated by a rescission of the sale, makes no party of the mass surrendered, and is not liable to any of the costs and charges of the *concurso*.

This is an action in which the plaintiff, as vendor, demands the rescission of the sale, and re-possession of certain slaves sold to the insolvent debtor, and now in the hands of his syndic, having been ceded with the other property. He shows that a mortgage was retained on the slaves, to secure the payment of the price, which is still unpaid; that the slaves were surrendered by the insolvent and are now in the possession of the defendant, who was appointed syndic by the creditors, and refuses to return them.

1. The syndic pleaded a peremptory exception, and denied the right of the plaintiff to sue in this manner, as all proceedings against the person and property of the insolvent were stayed.

2. That the syndic could not be sued in an action of rescission.

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3. The property surrendered by the insolvent, belongs to all his creditors ; the plaintiff still preserving his privilege on the property claimed by him.

4. The property claimed is subject to its proportion of the costs and charges incurred by the cession.

5. The plaintiff must wait and receive his proportion of the estate ceded, with the other creditors

The syndic finally pleaded a general denial, and prayed that the suit be dismissed.

The Parish Court decided that the action could not be maintained, as all proceedings against the property of the insolvent were stayed ; but that the plaintiff was entitled to a privilege on the proceeds of the slaves claimed, in virtue of his mortgage. Judgment was rendered accordingly, from which the plaintiff appealed.

*Preston*, for the plaintiff.

1. The defendant could not cede any other or greater rights than he had himself ; and were the slaves in his possession alone, the plaintiff could compel a rescission of the sale and return of the property.

2. The plaintiff has the absolute right to demand and obtain a rescission of the sale. *Louisiana Code, art. 2542.*

*Macready, in propriâ personâ*, as syndic, *contra*.

*Martin, J.*, delivered the opinion of the court.

The plaintiff in this case, demanded from his insolvent debtor, and the syndic appointed by the creditors, the rescission of a sale and the return of certain slaves, which were surrendered by the insolvent, and upon which a special mortgage had been retained for the price. He claimed the rescission on the ground that the price remained unpaid, and that in virtue of his mortgage, he had a right to take back the property sold. Judgment was rendered, denying him this privilege, and he appealed.

The plaintiff's demand was resisted by the syndic of the insolvent, on the ground that the action could not be main-

tained, because the slaves in question were part of the property surrendered ; and further, that all proceedings against the person and property of the debtor were stayed. Finally, because the slaves were liable, with the other property surrendered, for the costs and charges of the proceedings in the *concurso* of creditors.

The judgment of the Parish Court is erroneous. A sale is a synallagmatic contract which imposes on the vendor, the obligation of delivering the thing sold, and requires of the vendee the payment of the price. In the case of reciprocal obligations, the party who does not perform his part of the engagement, cannot avail himself of any rights resulting to him from the contract ; consequently, the other party may demand the rescission of the contract from the defaulting party.

The insolvent debtor not having paid the price, was not the absolute owner of the slaves ; and his right to the property was, therefore, not indefeasible.

The cession or surrender of the insolvent debtor's rights, for the benefit of his creditors, could not, and did not, change the character and nature of those rights. They remained the same ; for the debtor could only cede the rights he had, and in the condition they were at the time. What was conditional and defeasible in his hands, did not become absolute and indefeasible in the hands of his creditors. The plaintiff did not contravene the order staying all proceedings against the person and property of the insolvent, by exercising his right against the syndic.

The slaves in controversy, not being the absolute property of the ceding debtor, and his defeasible right to them being annihilated by the rescission of the sale, it follows they make no part of the property surrendered ; and their price cannot be diminished, or they in any manner held liable by the syndic of the insolvent's estate, for the costs and charges of the *concurso*.

The sale having been proved, and the obligation resulting therefrom shown to be reciprocal, and the price not pretended to have been paid, or any part of it ; it follows

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MORTGEE  
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In the case of reciprocal obligations, the party who does not perform his part of the engagement, cannot avail himself of any rights resulting to him from the contract : consequently the other party may demand its rescission.

In a reciprocal engagement, resulting from the sale of certain slaves, where the purchaser becomes insolvent, and surrenders the slaves with his other property, before payment of the price, he not being the absolute owner, his right to the property is defeasible, and the seller may have a rescission of the sale, and compel the syndic to return it and restore the possession.

Property ceded, of which the insolvent debtor is not the absolute, but only the defeasible owner, and when this defeasible right is annihilated by a rescission of the sale, makes no part of the mass surrendered, and is not liable to any of the costs and charges of the *concurso*.

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EASTERN DIST. that the plaintiff is entitled to have the contract or sale  
March, 1835. rescinded.

CHIAPELLA  
vs.  
COUPREY ET AL.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the sale of the slaves in question be *rescinded*; and that the plaintiff recover the possession of them from the syndic; the latter paying costs in both courts.

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*In the matter of CHIAPELLA vs. COUPREY ET AL.*

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF  
NEW-ORLEANS.

A distinction or difference necessarily exists between the office of a testamentary executor or administrator of an inheritance or succession, and that of a tutor or guardian. The former deriving their authority in another state or foreign country, cannot exercise their office here, until they obtain authority from the competent tribunal or Court of Probates, to execute the will or administer the property of the succession in this state.

A tutor regularly appointed in another state or foreign country, his authority to sue for, recover, receive or take possession of property situated in this state, belonging to the inheritance of his ward, will be recognised here, without confirmation by any of the tribunals in this state.

So, a tutor residing in another state or foreign country, and regularly appointed by the law of his domicil, may exercise his office by an agent or attorney in fact, in relation to receiving or recovering the inheritance or property of his ward, in this state.

On the 16th July, 1834, the plaintiff obtained a judgment against the defendants, the widow and minors Couprey,

residing in France, by attaching property in New-Orleans. On a sale under execution by the sheriff of the property attached, it produced the sum of eleven thousand five hundred and ten dollars twenty-eight cents, over and above the plaintiff's demand. The attorney in fact of the tutrix of the minor heirs of Couprey, took a rule on the sheriff to show cause why he should not pay and deliver over the balance of the funds in his hands, arising from the sale of the property of the said minors.

EATON DINT.  
March, 1835.

CHIAPELLA  
vs.  
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The sheriff answered that he was ready to pay over the money, if the court considered the attorney in fact of Mrs. Couprey, the mother and tutrix of her minor children, authorised to receive it.

The documents introduced in evidence by the attorney in fact of the tutrix of said minors, show, that the tutrix resides with her said minors in Bordeaux, in France, and that she has been regularly confirmed in her office as tutrix, and authorised by the judgment of the French court, with the advice of a family meeting, to sell the property of the minors in this state, the same which has been seized and sold to satisfy the judgment of the present plaintiff.

The parish judge was of opinion that, by the papers and documents produced by the attorney in fact, it appeared that some judicial authority, either in this country or in France, must have a control over the funds of the minors, and that since the question happens to come to the knowledge of this court, it is proper it should watch over their interests and safety. Judgment was rendered, ordering the sheriff to place this sum of money on deposit, and at interest, in the Bank of the Consolidated Association, subject to the further order of the court. From this order or judgment, the attorney in fact of the tutrix appealed.

*Denis argued this case, ex parte, for the appellant.*

No counsel appeared for the sheriff, who submitted the case on his part.

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March, 1835.

CHIAPELLA  
vs.  
COUFREY ET AL.

*Mathews, J.*, delivered the opinion of the court.

This case commenced by attachment issued against the property of certain minors, residing in the kingdom of France, together with their mother, regularly confirmed in her office of natural tutrix, by competent authority of that kingdom, where these defendants are all domiciled and reside. The property seized by means of the attachment was regularly sold under a *fieri facias*, which issued on a judgment rendered in the suit, and produced a sum much more considerable than was necessary to satisfy the judgment and costs, which was received by the sheriff who sold, &c., and is still in his hands. From the proceedings and judgment thus rendered and executed, no appeal was taken, consequently their correctness and legality are not now subjects of inquiry.

In this situation of the cause, a certain F. M. Rouzaul, acting under a power of attorney from the tutrix of the minors, moved the court for an order on the sheriff to pay over to him, as attorney in fact, the balance of the money, the proceeds of the sale of the property of the minors, which had been sold, as above stated. His motion was finally overruled, and the court below ordered the money to be deposited in the Bank of the Consolidated Association, until further order, &c. From the judgment thus rendered, the applicant for the order to pay to him, appealed.

The evidence of the case shows that the person from whom the appellant derives his authority, was regularly recognised as tutrix of her children, by competent authority, in the place of their domicil; and the power and authority granted to him from her, to represent her in matters relating to the property of her minor children in this state, is not disputed.

The case presents two questions for solution: first, whether the tutrix, deriving her authority to act as such, in a foreign country, and from the laws and judicial acts of the government of that country, would be authorised to possess herself of the property of her wards in this state, without authority granted to that effect, by one of its courts of probates? Second,

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if she could assume the rights and privileges belonging to her in the capacity of tutrix, without confirmation in her office here, can she delegate her power to another.

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March, 1835.

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vs.

COUPEY ET AL.

In coming to a decision on the first of these questions, a distinction or difference necessarily existing between the office of a testamentary executor or administrator of an inheritance or succession, and that of a tutor or guardian, must be kept in view. It has been settled by decisions of this court, in relation to the rights and duties appertaining to the former, that they cannot be exercised in this state, under the probate of a will in a foreign state, and authority there granted to carry it into execution, without causing the will to be here recorded, and obtaining authority from a competent tribunal to execute it: and an administrator by appointment in another state, is wholly without authority in this, to administer the property of a succession here situated, unless he be authorised to act by a court of probates in this state. These decisions were made in conformity with principles established by the courts of the United States, and the courts of the several states of the Union, in similar cases.

A distinction or difference necessarily exists between the office of a testamentary executor or administrator of an inheritance or succession, and that of a tutor or guardian. The former deriving their authority in another state or foreign country, cannot exercise their office here, until they obtain authority from the competent tribunal or Court of Probates, to execute the will or administer the property of the succession in this state.

Whether our decisions in relation to testamentary executors, might not have been questioned according to general principles of the civil law, need not now be inquired into. This matter must be considered as settled.

A question touching the power of a tutor or guardian of minors, deriving his authority from the laws and tribunals of a foreign state, in relation to property belonging to the inheritance of his wards in this, has never before the appearance of the present case, directly and positively required a solution by this court.

Our jurisprudence, as it affects rights to property and the ordinary relations of persons in a state of civilized society, is mainly based on principles derived from the civil law, or the rules of states and countries, having that system as the basis of the municipal legislation.

We have not found it convenient, nor have we deemed it necessary, to consult extensively the treatises of authors and commentators on the civil law, relative to the subject

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*vs.*  
COUFREY ET AL.

now before us. We have, however, examined judge Story's commentaries on the conflict of laws, (a work highly commendable for the industry and learning which it displays) particularly that part of it which treats of the power and authority of foreign guardians and administrators.

A tutor regularly appointed in another state or foreign country, his authority to sue for, recover, receive or take possession of property situated in this state, belonging to the inheritance of his ward, will be recognised here, without confirmation by any of the tribunals in this state.

The result of this examination has brought us to the conclusion, that in countries governed by laws similar to our own, the authority of a tutor regularly appointed in one state, to sue for and recover, or take possession of property situated in another, belonging to the inheritance of his ward, would be recognised in the latter, without confirmation by its tribunals.

It does not occur to us that any positive provision, contrary to this doctrine, exists in the laws of this state, and so long as foreigners are permitted to inherit property in this country, we are unable to perceive any good reason why impediments should be thrown in their way in a pursuit to recover and take possession of it, unless in a case where it was shown that the interests of our own citizens would probably suffer by its abstraction.

In conclusion on this point, it may not be useless to suggest the distinction between the situation of testamentary executors and administrators, and that of tutors, in relation to successions. The office of the former is merely administrative, and of very short duration, and confined solely to the property of the estate; whilst the latter have the guardianship and protection of minor heirs committed to their charge, and are bound to provide for their maintenance and education, and this for a considerable length of time; all to be effected by means of the funds of their wards. They would be unable to perform the duties required of them, if the possession of the successions, which they have a right to administer, was withheld from them.

So, a tutor residing in another state or foreign country, and regularly appointed by the law of his domicil, may exercise his office by an agent or attorney in fact, in relation to receiving or recovering the inheritance or property of his ward, in this state.

As to the second question propounded, we think it must be answered in the affirmative. No valid reason suggests itself to our minds, why a tutor should not be permitted to manage the estate of his wards, by means of the agency of an attorney in fact, as well as any other person. In practice, we believe, this often occurs.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court, be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the sheriff do pay over to the attorney in fact, F. M. Rouzaul, appointed by Catherine Lachais, widow Couprey, as tutrix of her minor children, &c., the money now in his hands, viz: eleven thousand five hundred and ten dollars and twenty-eight cents, being the proceeds of property sold by him, belonging to said children, as heirs of Henry Couprey, &c. The costs arising out of the motion made by said attorney in fact in the court below, and those of this court, to be paid out of the funds now in the hands of the sheriff, &c.

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MAHER ET AL.  
vs.  
PULLEY.

### MAHER ET AL. vs. PULLEY.

#### APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In applications for continuances of causes on the affidavit of the party, necessity and the general practice of the courts admits suitors to swear for themselves. Counter affidavits, as a general rule, cannot be received against an affidavit for a continuance.

Exceptions to the general rule, prohibiting suitors from swearing *pro* and *con*, for continuances, ought to be allowed when the case has been repeatedly continued on the application of the party, or where suspicions arise that he is acting in bad faith.

This is an action to recover from the defendant nine hundred and twenty-eight dollars sixty cents, the balance of an account annexed, for a flat boat and her cargo of bacon hams and shoulders.

The defendant admitted the sale, and purchase by him, of the boat and her cargo, but averred he was entitled to a deduc-

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March, 1835.

MAHER ET AL  
vs.  
FULLEY.

tion of one hundred and ninety-five dollars, on account of the too great disproportion of hams to shoulders. He also annexed an account of five hundred and ninety-three dollars thirty-six cents, including the one hundred and ninety-five dollars, over-charged by the plaintiffs, for goods, wares and merchandise sold to them, which he pleaded in compensation and reconvention.

On the trial, the defendant filed his affidavit for a continuance, alleging the absence of his witnesses, occasioned by the conduct of one of the plaintiffs, in proposing to settle the controversy amicably. The court allowed this plaintiff to file his counter affidavit, denying the statements in the first; and ruled the defendant to trial. He took his bill of exceptions to the opinion of the court.

The plaintiffs proved their account to the satisfaction of the court and had judgment. The defendant appealed.

*Sterrett, for the plaintiffs.*

*Roselius, contra.*

*Mathews, J., delivered the opinion of the court.*

This case is brought up on a bill of exceptions, taken to the opinion of the court below, by which the defendant was ruled to trial, after having made and filed an affidavit for a continuance.

It is not pretended that this affidavit does not show good grounds for a continuance. But the judge below admitted a counter affidavit made by one of the plaintiffs, in which the most important facts contained in that of the defendant, were denied.

In applications for continuances of causes on the affidavit of the party, necessity and the general practice of the courts admits suitors to swear for themselves. Counter-affidavits, as a general rule, cannot be received against an affidavit for a continuance.

When parties to a suit are permitted to swear for themselves, it is within the knowledge of any person the least conversant with judicial proceeding, that interest too often outweighs all moral influences and leads to perjury. In applications, however, for continuances of causes, the necessity of the case has induced a general practice of allowing suitors to swear for themselves, and we believe it to be

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unusual in practice for any of the tribunals of the first instance, in this state, to admit or receive counter affidavits from the opposite parties. Such a mode of proceeding would be extremely troublesome and inconvenient in the administration of justice, would be opening the door still wider for perjury, and would necessarily cause delays if the practice should be pursued so far as to allow swearing *pro* and *con* to any extent.

Yet, an exception to the general rule might be admissible, when, in consequence of a cause having been repeatedly continued on the application of a party, or from any other unusual circumstances attendant on his application for a continuance, suspicions were raised of his acting in bad faith.

The present case, to our view, offers no such circumstances. The cause had never before been continued at the instance of the defendant. We think the court below erred in ruling to trial, by admitting the counter affidavit.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled. And it is further ordered, that the cause be remanded for a trial *de novo*, and that the plaintiffs and appellees pay the costs of this appeal.

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March, 1835.

MAYER ET AL.  
VS.  
FULTON.

Exceptions to  
the general rule,  
prohibiting su-  
itors from swear-  
ing *pro* and *con*  
for continuances,  
ought to be al-  
lowed, when the  
case has been re-  
peatedly contin-  
ued on the appli-  
cation of the par-  
ty, or where sus-  
picions arise that  
he is acting in  
bad faith.

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DUPEUX  
VS.  
TROXLER ET AL.

DUPEUX VS. TROXLER ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The plaintiffs, as holders, sue the maker and endorser of a promissory note: intervenors claim the note and allege that it was the property of their ancestor, from whom it was stolen, and came unfairly and without consideration into the hands of the plaintiffs: Held, that when the testimony shows the note was not obtained in a fair course of trade, the holder is not considered *bonâ fide* and cannot recover as against the true owner.

This is an action by the holder against the maker and endorser of a promissory note, for two thousand three hundred and ninety-six dollars seventy-five cents, payable in all the month of March, 1834, at the parish judge's office, in the parish of St. Charles, and protested on the 3d of April, 1834, for non-payment. The plaintiff alleges the note was signed by E. Troxler, and payable to the order of F. Troxler, who endorsed it, and became the *bonâ fide* holder and owner thereof, in the usual course of trade, before its maturity, and for a good and sufficient consideration. He prays judgment for the amount thereof, with interest and costs.

The defendants admitted the execution of the note sued on, and avowed their willingness to pay its amount to the true owner; but they averred that said note belonged to the late Michel Friloux, by whom its loss by theft had been advertised, and consequently the plaintiff is not the *bonâ fide* and legal holder thereof. They pray that the suit be dismissed.

The heirs and legal representatives of Michel Friloux, deceased, intervened, alleging their ancestor was the true owner and legal proprietor of the note sued on; and that it was stolen before it became due, from the possession of Michel Friloux, in his life time, who advertised it and cautioned the public against receiving it; and that under

these circumstances, it came into the possession of the plaintiff, without any consideration being paid therefor. EASTERN DIST.  
March, 1835.  
They pray to be allowed to intervene, and declared to be the true owners of said note, and that they have judgment for its amount. DUPEUX  
vs.  
TROXLER ET AL.

The plaintiff denied the facts alleged by the intervenors, and charged them with combining and conniving with the defendants to defraud him. He avers, that even if the note was stolen, he received it in good faith, and for a valuable consideration, in the usual course of business, and was entitled to recover its amount.

The defendants avowed their willingness and that they were ever ready to pay the true and legal owner, when ascertained by the court, &c.

Upon these issues the parties went to trial. Several witnesses were produced by the plaintiff, and also by the intervenor: the testimony was contradictory.

The district judge was of opinion, that although the loss of the note was not fully proved, yet there was enough shown to put the plaintiff on his proof of the manner he obtained possession of it. His testimony showed that through the agency of a person acting as a broker, in the city, he purchased the note in question from a stranger, who offered it for discount and sale, one morning while the broker was walking in the market. This was in the summer of 1833, and before the note became due. This testimony is flatly contradicted by another broker, who gives an entirely different account of the note, but which with the other testimony goes to show the note had been stolen. The plaintiff's own declarations contradicted his witness.

On weighing the testimony given on all sides, the district judge gave judgment for the intervenors. The plaintiff appealed.

*Roselius*, for the plaintiff.

1. The presumption of law is, that the holder of a negotiable obligation is the *bonâ fide* owner thereof, until the contrary is shown. The testimony, in this case, establishes

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EASTERN DIST. in the most conclusive manner, that the note in question was  
*March, 1835.* transferred to the plaintiff for a valuable consideration.

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vs.  
TROXLER ET AL.

2. No equitable defence is admissible against an innocent holder of a negotiable note, who has obtained it in the common course of business, before its maturity.

3. The loss or theft of the note is not proved, nor have the defendants and intervenors complied with the formalities of law required under such circumstances.

4. The court below erred, as is shown by the bills of exception on record.

*Morphy*, for the intervenors and appellees, contended, that when the consideration of a note payable to bearer, and the rights of the holder are attacked, he is bound to show he came by it *bonâ fide*. In this case, the testimony shows conclusively the note was never negotiated by the original owner and holder, nor by any other lawful holder, to the plaintiff. *6 Martin, N. S.*, 565.

2. An endorsed note, although negotiable by delivery, yet when it is passed off and the right of the holder is contested, on the ground that he gave no consideration for it, or that no legal transfer took place, more strict proof is required of the transfer and consideration than in ordinary cases.

3. The formalities required by law, in relation to the loss of a written instrument, apply only to cases where the lost instrument is made the foundation of a suit, to recover the amount of it.

*Mathews, J.*, delivered the opinion of the court.

This is a suit brought by the holder of a negotiable note against the maker and endorser. The making and endorsement are admitted by the answer of the defendants, but they deny that the plaintiff is a *bonâ fide* holder. The intervention of P. Friloux et al. was permitted, who claim to be the rightful owners of the note in question. Judgment was rendered in their favor, from which the plaintiff appealed.

The decision of the case depends principally on matters of fact. The intervening parties allege that the note was the

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property of their ancestor, from whom it was stolen, and came unfairly and without consideration into the possession of the plaintiff. They claim the amount, &c., as heirs of the original proprietor.

The evidence of the case, in relation to the loss and theft of this note, was considered by the court below as sufficient to put the original plaintiff on proof of the manner in which he acquired it. Perhaps the testimony does not establish all the facts required to be shown in a case where a recovery is sought on an instrument lost or destroyed, according to the rules prescribed for the establishment of lost papers; but such as could be had in the present case, and such as was received in the court of the first instance, leaves no doubt on our minds, of the loss by theft, as alleged in the petition of the intervenors.

Many witnesses have testified in relation to the manner in which the plaintiff acquired possession of the note, and from a careful examination of their testimony, giving due weight to all, we are of opinion that he did not obtain it in a fair course of trade, and consequently that he is not the real owner or *bonâ fide* holder thereof.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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March, 1835.

DUPPEUX  
DE  
TROXLER ET AL.

The plaintiffs as holders, sue the maker and endorser of a promissory note: intervenors claim the note, and allege that it was the property of their ancestor, from whom it was stolen, and came unfairly and without consideration into the hands of the plaintiffs: Held, that when the testimony shows the note was not obtained in a fair course of trade, the holder is not considered *bonâ fide*, and cannot recover as against the true owner.

## CASES IN THE SUPREME COURT

EASTERN DIST.  
March, 1835.

DABOVAL  
vs.  
ESCURIX.

## DABOVAL vs. ESCURIX.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE  
THEREOF PRESIDING.

Where a *fieri facias* issues on a judgment, and the sheriff seizes and sells the property of the debtor under it: *Held*, that the sale and receipt of the money by the sheriff, discharges the judgment, even when the money is stayed in his hands by injunction obtained on the claim of another creditor.

So if, after seizure and sale of the debtor's property, the sheriff waste and expend the money, or embezzle it, and fail to pay it over to the creditor, the judgment will be discharged and another seizure cannot be made.

This is an appeal from a judgment quashing a writ of *capias ad satisfaciendum*. The plaintiff obtained a judgment against the defendant for four hundred and three dollars, with legal interest and costs, the 19th May, 1832. On the 26th of the same month, a *fieri facias* issued on this judgment, to the sheriff of the parish of St. James, and a negro woman and her child seized, (the property of the defendant in the execution) and which were sold for five hundred and ten dollars, which sum the sheriff, in his return of the 7th June, 1832, acknowledges to have received.

On the 21st June, the wife of the defendant obtained an injunction, enjoining the proceeds of the sale of the negro woman and child, in the sheriff's hands, on the ground that she had a prior claim and mortgage on her husband's property, for the restitution of eight hundred and fifty-five dollars, which sum he had received of her paraphernal effects.

On the 14th of August following, the plaintiff caused a *fieri facias* to be issued to the sheriff of the parish of Ascension, against the defendant. The sheriff made his return on the 23d of September, that no property was found in his parish.

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On the 29th of September, a *ca. sa.* was issued to the parish of Ascension. The sheriff returned, that he arrested and imprisoned the defendant on the 2d October, and on the 22d he took the benefit of the prison limits, according to law.

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DABOVAL  
THE  
SECURITY.

At the October term of 1833, of the District Court, in the parish of St. James, the defendant entered a motion that the plaintiff show cause why the *capias ad satisfaciendum* upon which the defendant was imprisoned, be quashed and set aside, and all proceedings under it declared null and void.

On hearing the motion and examining the record containing the original judgment and the several executions and writs, with the sheriff's returns thereon, the district judge rendered judgment quashing the writ of *ca. sa.*, setting it aside, annulling all the proceedings under it, and discharging the defendant from the prison limits. This judgment is dated and signed the 2d November, 1833. On the 25th October, 1834, the plaintiff appealed from it.

*Nicholls*, for the plaintiff and appellant, contended, that the judgment quashing the writ of *ca. sa.* was erroneous, because the arrest and imprisonment were legal, the sheriff having returned *no property found*, on the second execution.

2. The injunction staying the proceeds of sale under the first execution, deprived the plaintiff of any benefit arising from it. He had a right to issue his second execution. Nothing short of payment could satisfy the judgment. The seizure and sale made under the first writ did not operate payment or novation, as the proceeds were tied up and held subject to another claim. 3 *Martin*, 331. 7 *Martin, N. S.*, 162, 221. 8 *Ibid.* 315.

*A. Seghers*, for the defendant.

1. The return on the first execution, that sufficient property was seized and sold to satisfy the judgment, did not authorise an *alias fieri facias* to issue. 3 *Martin, N. S.*, 390.

2. The claim of a third person to a right or privilege on the property sold, of higher rank than that of the seizing

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creditor, cannot change the situation of the original parties, until it is acted on and decided. This claim stands in the same relation to them as an opposing creditor or intervening party. The plaintiff in execution still claims the money as his own, and has a right to a summary trial on this opposition. *Code of Practice*, art. 401.

3. The seizure and sale made under the first *fieri facias* being sufficient to cover the plaintiff's claim, the *alias fieri facias* and the *ca. sa.* were both illegally issued.

4. Even admitting an *alias fieri facias* could issue, it was illegally issued to the parish of Ascension, when the record shows the defendant's domicil was not there, but in the parish of St. James.

5. No return of *nulla bona* could be made on the *alias fieri facias*, in this case, because a man is presumed to hold his property at the place of his domicil; therefore the *ca. sa.* illegally issued. *Code of Practice*, art. 726, 730, 731.

6. The return itself was illegal, and no writ of *ca. sa.* could issue on it. The law requires the return to be made where the party wishes to take out his *ca. sa.*, "that the sheriff has found no property to seize, notwithstanding the demand made of the parties." 4 *Louisiana Reports*, 301.

7. The *ca. sa.* is itself illegal. It should have been directed to the sheriff of the parish in which the debtor resides, (the parish of St. James.) His flying into another parish, could not alter his situation and increase his liability to be imprisoned. *Code of Practice*, art. 730, 731.

8. The *ca. sa.* improperly issued, because the *fieri facias* was returned before the return day thereof.

*Martin, J.*, delivered the opinion of the court.

In this case, the plaintiff appealed from a decision and judgment of the district judge, quashing a writ of *capias ad satisfaciendum*, on which he had caused the defendant to be arrested and imprisoned.

The facts of this case are stated in a judgment lately pronounced between the parties, on a claim of the present

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defendant, against the present plaintiff, for damages, on the ground that the arrest and imprisonment, under the *ca. sa.*, was illegal. See 7 *Louisiana Reports*, 575.

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SECURIX.

The grounds on which the defendant sought to have the writ of *ca. sa.* quashed and set aside, are as follows :

1. The return of the writ of *fieri facias* by the sheriff, which the plaintiff first sued out, showed that property of the defendant, sufficient to satisfy the debt and judgment, had been seized and sold.
2. The application of the defendant's wife, to have the proceeds of the sale paid over to her, and the injunction by which they were provisionally stayed in the hands of the sheriff, did not authorise the plaintiff to sue out an *alias fieri facias*.
3. If an *alias fieri facias* could issue at all, it was illegally issued in this case, by directing it to the sheriff of another parish than that in which the defendant had his domicil.
4. The return on the *alias fieri facias* did not authorise a *ca. sa.* to issue, because it was made before the return day thereof; and because it did not state that the sheriff had called on either party to point out property.

The counsel for the plaintiff, on the other hand, contends :

1. That the seizure and sale of sufficient property, under the first execution, did not prevent his resorting to an *alias*, as nothing short of payment is a satisfaction of the judgment.
2. That there is nothing which prevents the issuing of a writ of *fieri facias* to another parish than that in which the defendant in execution has his domicil. If it was otherwise, a defendant by a change of domicil, or the removal of his property out of the parish, would protect it from execution and defeat the just claims of his creditors.
3. The sheriff is frequently unable to call on either party, to point out property to levy on; and there is no law which compels him to go out of his parish. As in the present case, it sometimes happens that neither of the parties is to be found, and nothing compels him to state this circumstance in his return.

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DABOVAL

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ESCRUNIX.

Where a *fieri facias* issues on a judgment, and the sheriff seizes and sells the property of the debtor under it: *Held*, that the sale and receipt of the money by the sheriff, discharges the judgment, even when the money is stayed in his hands by injunction obtained on the claim of another creditor.

So if, after seizure and sale of the debtor's property, the sheriff waste and expend the money, or embezzle it, and fail to pay it over to the creditor, the judgment will be discharged, and another seizure cannot be made.

4. There is no law which requires a sheriff to forbear returning a writ of *fieri facias*, when he is satisfied that the defendant has no property within his parish.

This court is of opinion the judge of the inferior court did not err in quashing the *ca. sa.* We are not ready to say that nothing but *payment* to the plaintiff, will discharge his judgment. But we think that an actual sale and the receipt of the money by the sheriff does satisfy the judgment on which the execution issues. This seems clearly the result in such cases; for if the sheriff should waste and expend the money, or embezzle it and fail to pay it over, we are of opinion, this circumstance would not authorise a new seizure or arrest of the original debtor.

It is unnecessary that we should examine or inquire into the consequences resulting from the success of the wife of the defendant, in sustaining her injunction. Until her pretensions, as set out in the injunction suit, are first acted on, it is evident that the money in the sheriff's hands, arising from the sale of the defendant's property, must be considered as belonging to the plaintiff in execution. Before a decision is had in the injunction case, nothing authorises a new seizure. Consequently, the *alias fieri facias* improperly issued, as did the *capias ad satisfaciendum* on its return of *nulla bona*.

The view and conclusion which the court has taken, and arrived at on the first point in this cause, renders it unnecessary to give an opinion on, or notice any of the remaining points.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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March, 1835.

GARLICK  
vs.  
REECE.

## GARLICK vs. REECE.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE  
THEREOF PRESIDING.

Where the plaintiff is not the holder of a note sued on, but only his agent to deliver it to the maker, and knew a great part of the amount had been paid, and that he took advantage of the absence of the maker to obtain a judgment, it would present the case of a judgment obtained through fraud, which might be avoided by direct action of nullity.

Pending an action of nullity, the party may obtain an injunction to prevent the judgment creditor from gaining any advantage by the alleged fraud, in pursuance of the general authority to issue injunctions, conferred by article 303 of the Code of Practice.

The defendant cannot enjoin a judgment to obtain credit for payments made before suit was brought, and for the purpose of partial relief, leaving the judgment to subsist as to the balance.

An injunction cannot issue to stay execution on grounds which might have been pleaded in defence before judgment.

This case commenced by injunction. The plaintiff claims a credit of six hundred dollars on his note, and judgment thereon for eight hundred dollars, which judgment, he alleges, the present defendant obtained through fraud, and without allowing the proper credits. He prays that the execution, issued on said judgment, be enjoined for the sum of six hundred dollars, and for general relief. The injunction was granted.

On motion of the defendant and on the face of the petition, the court dissolved the injunction, with ten per cent. damages on the six hundred dollars enjoined, and costs. The plaintiff in injunction appealed.

*Labauve*, for the plaintiff and appellant.

1. The petition in this case, sets forth good grounds of action, and shows that manifest injustice has been done to

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**EASTERN DIST.** the petitioner. The judgment dissolving the injunction is,   
March, 1835. therefore, clearly erroneous and should be reversed.

**GARLICK**

**DR.  
REECE.**

*Ives and Stacy*, for the defendant.

1. No cause is shown on the face of the papers for an injunction. In the petition for it, it is explicitly stated by the party, that he gave directions that should "*a sui*" be brought against him, (Garlick) in his absence, by Reece, the petition should be *served upon his attorney, Zenon Lebauve*, which service would be the *same as if made upon himself*. In this same petition, he acknowledges the service to have been so made.

2. Being cited before the court in the manner he had specially directed, as appears by his own showing, he can urge nothing against the judgment obtained against him, but such as he might have opposed to it had he been personally cited, and defended the suit in person. 8 *Martin, N. S.*, 187, 232. 2 *Louisiana Reports*, 137.

3. Had that been the fact, the judgment could not have been legally enjoined, for the matters appearing in the petition, at most, only subsidiarily to a prayer for the nullity of the judgment. 8 *Martin, N. S.*, 232. *Ibid.*, 510. 2 *La. Reports*, 137.

4. The party has mistaken his right of action, if he had any, which is denied. He should have brought suit to *annul* and set aside the former judgment. The petition contains no such prayer; consequently, it cannot be granted; neither can any testimony be heard in favor of it. 2 *Louisiana Reports*, 137.

*Bullard, J.*, delivered the opinion of the court.

The facts set forth by the plaintiff, upon which he grounds his prayer for relief, against a judgment recovered against him, by the defendant, are the following: That Reece had obtained judgment, in October, 1833, on a note drawn in favor of Nicholas Murray and endorsed by him, for eight hundred dollars, dated, May, 1830; that this judgment was fraudulently obtained; that Reece knew of a payment of six

hundred dollars, made by the petitioner, on the note, to Murray, and that he was not the *bonâ fide* holder, but had been entrusted with the note, to be given up to the plaintiff, having advanced the remaining two hundred dollars. The plaintiff further avers, that being obliged to leave the parish of Iberville, for some time, and expecting the defendant to sue him, at the approaching term of the District Court, on an account, he authorised service of process to be made on his attorney; that the defendant brought suit on the note, and that his attorney, having no knowledge of the facts and no instructions as to the defence, suffered judgment to go against him; and that on his return, he found judgment signed on the note, which he never knew was in the possession of the present defendant. He avers that he was taken by surprise, and that the judgment was obtained by fraud and concealment.

These facts were sworn to by the petitioner, and the judge thereupon directed an injunction, to stay proceedings on the execution, as to the six hundred dollars alleged to have been paid to Murray.

At the succeeding term of the court, the defendant moved the court to dissolve the injunction, on the ground that the facts and allegations set forth in the plaintiff's petition, in order to obtain said injunction, are insufficient in law to authorise the issuing of said writ. The injunction was dissolved, and the plaintiff appealed.

The question which this case presents is, therefore, whether, admitting the truth of all the allegations in the petition, they make out such a case as would authorise the interposition of the court, to stay proceedings on a judgment obtained under such circumstances.

If it be true that Reece was not the holder of the note, that he was the mere agent of the holder, to deliver it to the plaintiff; if he knew that a great part of the amount had been paid, and that he took advantage of the absence of the plaintiff, to obtain a judgment, it would seem to present a case of a judgment obtained through fraud, on the part of the plaintiff, and which might be avoided by direct action of

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vs.  
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Where the plaintiff is not the holder of a note sued on, but only his agent to deliver it to the maker, and knew a great part of the amount had been paid, and that he took advantage of the absence of the maker to obtain a judgment, it would present the case of a judgment obtained through fraud, which might be avoided by direct action of nullity.

Pending an action of nullity, the party may obtain an injunction, to prevent the judgment

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creditor from  
gaining any ad-  
vantage by the  
alleged fraud,  
in pursuance of  
the general au-  
thority to issue  
injunctions, con-  
ferred by article  
305 of the Code  
of Practice.

The defendant  
cannot enjoin a  
judgment, to ob-  
tain credit for  
payments made  
before suit was  
brought, and for  
the purpose of  
partial relief,  
leaving the judg-  
ment to subsist  
as to the balance.

An injunction  
cannot issue to  
stay execution,  
on grounds  
which might  
have been plead-  
ed in defence be-  
fore judgment.

nullity, instituted in the same court which had pronounced it. *Code of Practice, articles 607 and 613.*

Pending an action of nullity, in such a case, the court might, perhaps, be authorised to grant and maintain an injunction, to prevent the judgment creditor from gaining any advantage by the alleged fraud, in pursuance of the general authority to issue injunctions conferred by article 305 of the Code of Practice.

But this is not an action to annul the first judgment on the ground of fraud; but the plaintiff seeks only to obtain credit for six hundred dollars, paid before suit was brought, for the purpose of partial relief, leaving the judgment to subsist as to the balance of the note. The suit must be considered only as an incident to the first, in the relation of an opposition to its execution, either in whole or in part. 4 *Louisiana Reports, 90 and 293.*

Viewing the case in that light, we think the court did not err in refusing to open the first judgment, in order to inquire into the defence of which the defendant might have availed himself, on the trial. It has been repeatedly decided by this court, that an injunction cannot issue to stay execution, on grounds which might have been pleaded in defence before judgment. 8 N. S. 513. 2 La. Reports, 181. 1 N. S. 71.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs, reserving, however, to the plaintiff the right, if any he have, to proceed by action of nullity.

EASTERN DIV.  
March, 1835.

**TILGHMAN v. LEWIS'S ESTATE.**

TILGHMAN  
vs.  
LEWIS'S ESTATE.

**APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF  
NEW-ORLEANS.**

Where the plaintiff claims from the executor of his uncle's estate, a large sum for his services as clerk and book-keeper, at a stated annual salary for the time he served, and there is no proof of any contract or agreement to pay a salary or wages at any particular rate per annum; and where that assumed by the plaintiff clearly appears by his own interpolation in the books of his employer: *Held*, that he cannot recover in such a case, having depended on the generosity of his relation for remuneration.

So, the plaintiff cannot recover as on a *quantum meruit*, when he sues for wages on an agreement for an annual salary or hire, and when the evidence shows he served under no contract, expressed or implied, but depended on the beneficence of his employer, who was his relation; and when it is also shown he improperly interpolated a feigned contract for wages, in the books he was employed to keep.

This is an action against the estate of the late Robert Lewis, to recover the sum of eleven thousand six hundred and twenty-five dollars, for services rendered, and settled in the books of the deceased, in his lifetime, from the 24th November, 1824, until the 24th March, 1831, at the rate of fifteen hundred dollars per annum; and for like services in a running account from the 24th of November, 1831, till 26th August, 1832. The plaintiff alleges that the testamentary executor refuses to allow his account, for which he prays judgment against the succession.

The executor on behalf of the estate, pleaded a general denial; and denied specially that his testator owed the plaintiff any sum whatever, for services or otherwise, at his death. He avers the plaintiff is indebted to the succession of which he is executor, in the sum of three hundred and fifty dollars, for which he prays judgment in reconvention. The evidence showed that the deceased Robert Lewis, done

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vs.  
LEWIS'S ESTATE.

a very large business in buying and selling produce, and in drayage, and had a considerable estate in negroes, drays, horses, and houses and lots; that the plaintiff was his nephew and principal clerk, and had been in his employ six or seven years; and that from the fall of 1830, to the time of Lewis's death, in August, 1832, the plaintiff transacted most of his business, and was consulted by his employer generally, in regard to it. It was also shown that Mr. Lewis made provision in his will for his nephew, leaving him a legacy of six thousand dollars, which was paid by the heirs. It also appeared he received his support from his uncle, and his pocket money, while he lived with him.

The books and ledgers of Robert Lewis, which had been kept by the plaintiff, during his employment as clerk, were produced in evidence, but "*only to show the extent of the labor of the plaintiff, and the manner in which he kept them.*" On the inspection of the books, as offered in evidence, the probate judge remarks: "that the entry on which the plaintiff relies to establish the greater part of his claim, affords no satisfactory evidence of its justness:

1. Because the entry, which is stated as follows: "*by services rendered from the 24th November, 1824, as per agreement, at fifteen hundred dollars per year,*" is in the handwriting of the plaintiff himself.
2. The place in the book in which this entry has been made, clearly shows that it could not have been made at the time the alleged agreement is said to have taken place; because no entry was made anterior to 1826, and the one in question, from the place it occupies, could not have been made before 1828.
3. The testimony shows, the books remained in the possession of the plaintiff, six or seven days after his employer's death.
4. This entry was never seen before this period by a former and late clerk, who was well acquainted with the books.
6. There are other suspicious entries under the head of plaintiff's account in the books which he kept, &c.

From all the evidence, the court inferred the plaintiff relied on the bounty of his deceased relative for compensation for his services, and that nothing was stipulated by way of agreement. That his support and the legacy of six thousand dollars left him in the will of his uncle, was to be viewed as in remuneration of his claims. From all these considerations, he was entitled to recover nothing, either on an agreement or on a *quantum meruit*. Judgment was rendered in favor of the defendants. The plaintiff appealed.

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*Preston*, for the plaintiff.

1. The letters of Robert Lewis show that the plaintiff was in his employ since 1824, as well as the testimony in the case.
2. The testimony of the witnesses proves that the plaintiff was in the employment of Lewis; and continued so to the time of his death, the 25th August, 1832.
3. The testimony of these witnesses shows the business of Lewis to have been very great and various, and the services of plaintiff to have been most important, as his principal clerk and agent.
4. An inferior clerk is shown to have received sixty dollars a month for his services. The plaintiff is, of course, entitled to more.
5. The executor himself admits, on oath, the plaintiff's services were fairly worth fifty dollars a month.
6. The legacy to Tilghman was gratuitous; nothing shows it to have been remunerative. *It does not compensate wages.* *Louisiana Code*, 1834.
7. The defendants received ample compensation for it in plaintiff's not appearing to support the will of Robert Lewis,

*Slidell*, contra.

*Mathews, J.*, delivered the opinion of the court.

This suit was commenced against the executor of the deceased, but his will having been subsequently annulled, it was carried on against his heirs, &c.

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vs.  
LEWIS'S ESTATE.

The plaintiff claims a large sum of money from them on account of services rendered to the deceased, during several years of his life time, as clerk, &c. Judgment was rendered in favor of the defendants in the court below, from which the plaintiff appealed.

Where the plaintiff claims from the executor of his uncle's estate, a large sum for his services as clerk and book-keeper, at a stated annual salary for the time he served, and there is no proof of any contract or agreement to pay a salary or wages at any particular rate per annum, and where that assumed by the plaintiff, clearly appears by his own interpolation in the books of his employer:

*Held,* that he cannot recover in such a case, having depended on the generosity of his relation for remuneration.

So, the plaintiff cannot recover on a *quantum meruit*, when he sue for wages on an agreement for an annual salary or hire; and when the evidence shows he served under no contract, express or implied, but depended on the beneficence of his employer, who was his re-

The claim is made on a pretended contract for wages, at the rate of fifteen hundred dollars per annum, and the plaintiff alleges that he rendered services from the year 1824, until 25th August, 1832, the time of the death of his employer, who was his uncle. The will of the deceased contained a clause, by which a legacy amounting to six thousand dollars was given to his nephew, which was paid to him by the heirs who attacked the testament, on condition that he would not aid in supporting it.

The testimony proves the length of time during which the petitioner served his uncle as clerk, but there is no proof of any contract or agreement to pay wages at any particular rate of hire; that assumed as the basis of the action, being shown clearly to be an interpolation made by the plaintiff in the books of his employer, and most probably after the death of the latter.

The only remaining question in the case is, whether judgment ought to have been given in favor of the appellant, as on a *quantum meruit*. In relation to this question the court below considered the evidence offered in the defence, as sufficient to establish the fact that he did not serve under any

contract, either express or implied, and depended entirely on the beneficence of his employer to make remuneration for the services rendered. The testimony of the cause does not explicitly prove this fact; but, taken in conjunction with the circumstance of the relationship which existed between the employer and his servant, and the fact of the latter having improperly interpolated a feigned contract for wages, in the books by him kept for the former, we are of opinion that the Court of Probates did not err in deciding against the plaintiff's claim. It is readily perceived that, according to the manner in which we have treated this question, it has

not been considered that the receipt of the amount of the legacy by the appellant, ought, in any manner, to affect his claim for wages; the rejection of it resting exclusively on another principle, viz: that he served not for any stipulated wages, under a contract, either express or implied, but depended wholly on the generosity of his relation, for recompense.

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OTT

vs.

MORTEE.

lation, and when  
it is also shown  
he interpolated  
a feigned con-  
tract for wages,  
in the books he  
was employed to  
keep.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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OTT vs. MORTEE.

APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT, THE  
JUDGE THEREOF PRESIDING.

Where the plaintiff's counsel employed a person to make a demand on the debtor, who presented the account, but did not tell the defendant it was his only business or that he came to make a demand: *Held*, to be sufficient, when, from the circumstances attending this fact, the judge who tried the case was satisfied the amicable demand was proven.

This is an action on an account for work and labor, done by the plaintiff, in the capacity of mill-wright, at the rate of three dollars per day. He claims seven hundred and five dollars as the amount due to him, with a privilege on a saw mill, which he built for the defendant.

The defendant admitted he employed the plaintiff to work and superintend the building of a saw mill, but that through intemperance and dissipation, he became disqualified to render the services he engaged, to the defendant's damage, thirteen hundred dollars, and that he had already paid him three hundred and twenty two dollars, which sums he demands in reconvention. He further pleaded there was no amicable demand made of the account sued on

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OTT  
DR.  
MORTON.

The plaintiff proved, that his attorney gave the account sued on to the deputy sheriff, and made a verbal request that he would make a demand. The deputy sheriff did so; he took the note to defendant's house, where he frequently went. Did not tell the defendant that it was his only business, but knows the latter understood it to be a demand.

The case was submitted to a jury, who returned a verdict for the plaintiff of three hundred and fifty dollars. Judgment being rendered in conformity to the verdict, the defendant appealed.

*Flower*, for the appellant.

*Penn, contra.*

*Bullard, J.*, delivered the opinion of the court.

The appellant claims a reversal of the judgment rendered in this case, on the ground that the plaintiff failed to prove an amicable demand, and that judgment should have been given against him for costs. The evidence, indeed the only evidence in the cause, shows, that one Kirkland was employed by the plaintiff's attorney, verbally, to make a demand of the defendant, and that he went out and presented the account to the defendant, but did not tell him it was his only business. The witness says he knows the defendant considered it as a demand. This is a question of fact.

Whether the presenting of the account, was at the time considered by the defendant as a demand, may depend on various circumstances. The account was certainly presented for some purpose. Of these matters, the courts of the first instance can better judge than we, from their knowledge of the characters and habits of witnesses. In this case, the court considered the amicable demand sufficiently proved, and we see no good reason why its judgment should be disturbed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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HELLUIN ET AL.  
VS.  
MAURIN.

HELLUIN, PARISH TREASURER, &c. C. VS. MAURIN.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT.

The parish treasurer, although authorised to receive all moneys due to the parish, is not the proper person to sue or be sued, in regard to parish claims.

A judgment rendered in a suit in which the parish treasurer is plaintiff or defendant, (if he be not expressly authorised) will not be *res judicata* against or in favor of the parish, in its corporate capacity.

The parish treasurer should be expressly authorised to institute suit, in order that the corporation be bound by whatever judgment is rendered in the case.

The plaintiff, as parish treasurer of the parish of Assumption, instituted suit against the defendant, to recover the sum of four hundred and forty dollars, which he alleges the latter collected in taxes, on suits due to the parish, during the years 1824-5, while he was sheriff of said parish.

The plaintiff alleges the defendant has failed to account to him for the taxes for the years before stated, according to a list made out by the clerk, and put into his hands for collection. He prays judgment for the sum of four hundred and forty dollars, and costs.

The defendant pleaded a general denial. The plaintiff proved the demand set forth by him, and had judgment for the sum claimed. The defendant appealed.

*A. & J. Seghers*, for the plaintiff.

1. The sheriff is bound to collect and account for the taxes, on suits in the District and Parish Courts, in his parish, on a certified list being delivered to him by the clerk of the court. 2 *Moreau's Digest*, 49; 1 *ibid*, 627, sec. 4, *verbo juries*.

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2. The plaintiff, as parish treasurer, sues for the sole use and benefit of the parish, which the law authorises him to do. 2 *Moreau's Digest*, 378, sec. 11, *verbo sheriff*.

3. The objection made to the plaintiff's want of authority to sue, should have been specially pleaded in *limine litis*, in order to put him to the proof of his authority. The general denial does not put his capacity to sue, at issue. 5 *Martin, N. S.*, 343.

*Conrad*, for the defendant.

1. The judgment rendered in this case is not supported by legal evidence.

2. Parish treasurers have no authority to institute suits for the recovery of debts due to their parishes. They are mere officers under the direction of the police juries, who are corporate bodies; and all suits for the benefit of the parish, should be brought in their name. 2 *Moreau's Digest*, 242, sec. 5. *Code of Practice*, art. 112.

3. The law already referred to in the act of 1813, sec. 5, expressly prescribes the mode of proceeding in a case like the present.

4. The want of right or capacity in the plaintiff to sue as parish treasurer was not required to be specially pleaded. 4 *Martin, N. S.*, 436.

*Martin, J.*, delivered the opinion of the court.

This is an action by the parish treasurer for the parish of Assumption, against the defendant, who is sheriff of the same parish, to recover from him the amount of certain taxes on suits, which the law requires the sheriff to collect and pay into the parish treasury. The plaintiff had judgment for the sum of four hundred and forty dollars from which the defendant appealed.

In this court the counsel of the defendant contends that the act of 1823, section 3, 1 *Moreau's Digest*, 627, which imposes this tax, requires, indeed, that the sheriff shall collect and pay it into the parish treasury; but the 5th section points out the mode of recovery from him, in case of

failure to pay, viz: on motion of the district attorney in any court of competent jurisdiction; and further, that the tax is imposed for the benefit of the parish, which is represented by the police jury, which is a corporation established by law, and its members are the trustees or directors to manage the concerns of the corporation, of which the parish is constituted.

On the other hand, the appellee urges that the summary mode of recovery on motion is only cumulative, and does not prevent a resort to the ordinary remedy by petition. He also contends that the plaintiff sues as parish treasurer, and the case is the same as if the parish had sued by its treasurer.

The office of the parish treasurer, *ex officio*, authorises the incumbent to receive all moneys due to the parish, but it does not necessarily authorise and require him to represent the parish corporation in court, either as plaintiff or defendant, so as to render a judgment in any suit he may see fit to institute for money due to the corporation, as *res judicata* against it. He ought to be expressly authorised to institute suit, in order that the corporation be bound by whatever judgment should be rendered.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that judgment be entered for the defendant, as in case of non-suit, with costs in both courts.

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The parish treasurer, although authorised to receive all moneys due to the parish, is not the proper person to sue or to be sued in regard to parish claims.

A judgment rendered in a suit in which the parish treasurer is plaintiff or defendant (if he be not expressly authorised), will not be *res judicata* against or in favor of the parish, in its corporate capacity.

The parish treasurer should be expressly authorised to institute suit, in order that the corporation be bound by whatever judgment is rendered in the case.

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KEENE  
vs.  
CLARK'S HEIRS.

KEENE vs. CLARK'S HEIRS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the evidence shows that all the land on a certain water course, on which a tract, claimed under a Spanish grant is situated, from its source to its mouth, has been surveyed by order of the United States, and although the tract claimed must have been passed over and embraced in the survey of the entire tract; yet this does not amount to an eviction of the claimant, so as to authorise him to recover back the purchase money from the vendor.

The plaintiff alleges, that in 1807, the late Daniel Clark, through his agent, R. Relf, sold to him a tract of land situated on the bayou *Arroyo del Bosque Roxo*, or Redwood Creek, near Baton Rouge, between the Perdido and Mississippi rivers, for the sum of ten thousand dollars. That Clark derived the land in question through a grant from the Spanish government, after the date of the treaty of San Ildefonso, in 1800. That after the cession of this country to the United States, by France, in 1803, the former became entitled to all the public land thus ceded; and did, in pursuance of several acts of congress, take possession of all the land, including that sold by Clark to the plaintiff, in that section of the country. That, in consequence of the United States taking the actual possession of this tract, he is entitled to the reimbursement of the purchase money. He prays that the heirs and legal representatives of Daniel Clark be cited according to law; and that he have judgment for the said purchase money, interest, damages and costs.

The agent of the defendants answered and pleaded the general issue. He admits the sale made by him as agent of Clark, but not that any consideration in money, land or moveables, was ever paid by the plaintiff. He also avers,

that the plaintiff acquired a good and valid title to the land, which if lost, or he is evicted, it is his own fault.

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On the trial, the plaintiff offered in evidence, to prove that he was evicted from the land purchased by him from the defendant's ancestor, a connected plat of surveys made by order of the United States government, which showed that all the land on Redwood Creek had been surveyed, from its head to its mouth. He inferred from this circumstance, the fact, that the United States have taken possession of his land, by which he is evicted and entitled to a return of the price.

The district judge, on the authority of the case of *Bessy vs. Pintado*, 3 *Louisiana Reports*, 488, decided against the pretensions of the plaintiff, and rendered judgment for the defendants, with costs.

The plaintiff appealed.

*Keene, in propriâ personâ*, made the following points:

1. That the sale of the land, the price of which is now claimed, was duly made by the ancestor of the defendants, and the sum or price of ten thousand dollars is expressly stated in the act of sale, to have been received. This act is authentic and makes full proof of all the matters it contains. *Partida 3, title 18, l. 1. Louisiana Code, article 2231.*

2. The government of the United States took possession of this land, as being a part of the public domain, and evicted therefrom the plaintiff, who had constructive possession by his deed of sale from the defendant's ancestor.

3. Eviction is defined to be "the loss suffered by the buyer of the totality of the thing sold, or of a part thereof, occasioned by the rights or claims of a third person." In this case, the plaintiff has lost the entire tract or thing sold, by the adverse possession of the United States government. *Civil Code, article 50, page 354. 1 Peters, 253.*

4. Damages and the return of the price are incident to, and result as a matter of right, given by law to the party evicted. *Louisiana Code, article 2482. 6 Martin, N. S., 108.*

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5. The vendor in this case, had no right to make the sale he did, when he had no title and was unable to make a legal title to the land sold. *8 Martin, N. S.*, 400.

*L. C. Duncan*, for the defendants, placed the defence on the principles of the case of *Berry vs. Pintado*, 3 *Louisiana Reports*, 488, in which it is decided, that the sale of a tract of land, under a Spanish grant, is not void because the United States refused to confirm it, nor does that circumstance amount to an eviction.

2. Neither does the fact that the United States surveyed the land in question, amount to an eviction; consequently, the plaintiff cannot recover.

*Martin, J.*, delivered the opinion of the court.

In this case the plaintiff instituted suit against the defendants, who are the heirs and legal representatives of the late Daniel Clark. He claims from them the price of a tract of land sold to him by their ancestor, in the year 1807, amounting to ten thousand dollars, with interest. The title of Clark, which he sold to the plaintiff, is alleged to have arisen under a grant of the Spanish government, in Louisiana, after the date of the treaty of San Ildefonso, and lying near East Baton Rouge, between the Mississippi and the Rio Perdido. That the United States, who are the proprietors and owners of all the tract of land, of which the premises in contest constituted a part, have taken possession of it, in consequence of which he is evicted.

The defendants pleaded the general issue, &c. The District Court was of opinion, the plaintiff failed to prove any eviction on his part, and gave judgment for the defendants. The plaintiff appealed to this court.

On the argument of the cause, the plaintiff contended, that he showed an eviction, from the evidence which established the fact, that the whole land along the stream or bayou, on which the tract in question is situated, from its source to its mouth, has been surveyed by order of the United States.

On a full consideration of the case, this court is of opinion the district judge did not err in rendering judgment in favor of the defendants. It is true, the surveyors must have necessarily passed over the land of the plaintiff, in making a survey of the entire tract of land situated on the same water course. But it does not appear that it was occupied, or that any person on it was thereby disturbed.

The judge of the District Court, in deciding on this case, refers to the case of *Bessy vs. Pintado*, 3 *Louisiana Reports*, 488, which was that of a tract of land, part of which only had been confirmed to the purchaser, who sought an indemnification for the remainder from his vendor. We were of opinion in that case, he could not be relieved, because he had not shown any eviction.

The present case differs from that one, in this, that here the United States have exercised an act of ownership over a vast tract of country, some small parts of which, may be well supposed to have been lawfully possessed, and even owned, by individuals. This does not appear to amount to an eviction of the title of any of those individuals, much less an eviction in any particular case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.  
March, 1835.

KEENE  
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CLARK'S HEIRS.

Where the evidence shows that all the land on a certain water course, on which a tract claimed under a Spanish grant is situated, from its source to its mouth, has been surveyed by order of the United States, and although the tract claimed must have been passed over and embraced in the survey of the entire tract, yet this does not amount to an eviction of the claimant, so as to authorise him to recover back the purchase money from his vendor.

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MORRISON  
vs.  
FRENCH.

MORRISON vs. FRENCH.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The original holder of a note, who had, with other creditors, executed a release of the debtor, under an assignment of his property, for the benefit of his creditors, is a competent witness to testify in a suit brought against the maker, by another person, who afterwards gets possession of the note.

Where the right to sue is expressly denied to the holder of a promissory note, and the evidence does not show he received the note from a person authorised to negotiate it, and where it is shown the note was not put in circulation at the time a discharge was given by the original holder against it, under an assignment of property by the maker: *Held*, that the plaintiff cannot recover, but will be non-suited.

This is an action on a promissory note for eleven hundred and twenty-five dollars fifty-six cents, dated at Philadelphia, September 6, 1830, executed by the defendant, and payable to his order, six months after date. The plaintiff alleges he is a resident of the city of New-York, and that the defendant is indebted to him in the amount of the note, for which he prays judgment.

The defendant admits his signature to the note, but avers, the plaintiff is not the true owner of it; and that after said note became due, and before its transfer, he made an assignment of his property, for the benefit of his creditors, in Philadelphia, the 11th of March, 1831, and obtained a complete discharge from all his debts; that the note sued on was then due, and in the hands of one Jee, to whom he gave it for merchandise, and who, with the other creditors, gave a full and complete discharge. He pleads the discharge in bar, and prays judgment in his favor.

He propounded the following interrogatories to the plaintiff:

1. Are you the *bonâ fide* holder of the note in suit?
2. If so, state from whom, and when you received it, and what consideration you paid for it?

3. Did you not know that Edward A. Gee had given a release and discharge to B. F. French, the defendant, for said note, before it was transferred to you?

4. Has not E. A. Gee still an interest in said note: If yea, what is that interest?

To the first interrogatory the plaintiff answers in the affirmative.

2. He says he purchased the note from N. Sylvester, for seven hundred dollars in cash, the 15th November, 1833.

3. He had no knowledge he had given a release and discharge of said note, to B. F. French, at any time before he purchased it.

4. He answers in the negative: and that he knew at the time, he purchased it at considerable risk, as he understood Mr. French was about leaving Louisiana.

These answers were read by the plaintiff.

The defendant proved by the deposition of Gee, the original holder of the note, that he (Gee) had an interest in, and was the true owner of the note, and that he had signed a release and discharge of French, as averred by him in his answer. This testimony was corroborated by other witnesses. The release and discharge was also in evidence. The testimony of Gee was objected to, on the ground that the witness, from his own showing, had a direct interest in the suit. The court admitted it, and the plaintiff excepted.

The district judge was of opinion that, as the plaintiff's right to the note was questioned and denied, he had shown no right to sue on it. Judgment of non-suit was entered. The plaintiff appealed.

Carter, for the plaintiff.

1. The judgment should be reversed and the plaintiff reinstated, with judgment in his favor. He was the *bonâ fide* holder and owner, for a valuable consideration, as is shown by his answer, on oath, to the question propounded by his adversary.

2. The testimony of plaintiff, consisting of his answers on oath, was not impeached, according to law: only one

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witness was offered to contradict it, and he was objected to, on the score of interest, and should have been excluded.

3. The defendant must be bound by the answers of the plaintiff, which clearly make out his case, and his right to recover.

*Roselius*, for the defendant.

1. The evidence clearly establishes that the plaintiff obtained the note long after it became due, and under suspicious circumstances.

2. Jee's testimony was properly admitted. He had no interest in the issue of this cause ; he can, under no circumstances, recover on the note against French ; he may have a claim against his assignees.

3. French could not obtain possession or take up the note, because it remained in the possession of the original holder, until the dividends were received of the assignees.

*Bullard J.*, delivered the opinion of the court.

The plaintiff sues on a promissory note, drawn by the defendant, to his own order, and endorsed by himself, dated September 6, 1830, and payable six months after date.

The defendant admits his signature, but denies that the plaintiff is the true and legal holder of the note ; he further alleges, that if the note does belong to plaintiff, it was transferred to him after maturity. Finally, the defendant pleads a release and discharge executed by one Edward A. Jee, who, he avers, was at that time the holder of the note sued on. The release appears to have been executed by the creditors of the defendant, at Philadelphia, upon his making an assignment of his property to them. There was judgment of non-suit, and the plaintiff appealed.

The original holder of a note, who had, with other creditors, executed a release of the debtor, under an assignment of his property for the benefit of his creditors, is a competent witness to testify in a suit brought against the maker by another person, who afterwards gets possession of the note.

Our attention is called to a bill of exceptions taken to the admission of the deposition of Jee, the original holder of the note in question, and who had executed with the other creditors, the release set up by the defendant. It is contended that he is incompetent, on the ground of interest. We think the court did not err in admitting the deposition. The

witness could neither gain nor lose by the event of this suit, either directly or indirectly. He had no longer an interest in the note, which had been cancelled without being put in circulation by him; and the judgment in this case could not either increase or diminish the dividend to which he would be entitled, out of the property surrendered. *4 Martin, N. S.*, 539.

The evidence in the case has failed to satisfy us, as it did the court in the first instance, that the plaintiff acquired the note sued on, from a person authorised to negotiate it. In answer to interrogatories, the plaintiff says that he purchased the note from Nathaniel Sylvester, in November, 1833. There is no evidence that Sylvester had any interest in it, or authority to sell it. It had been due more than two years, and the evidence shows that it had not been put in circulation at the time the discharge was given.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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Where the right to sue is expressly denied to the holder of a promissory note, and the evidence does not show he received the note from a person authorised to negotiate it, and where it is shown the note was not put in circulation at the time a discharge was given by the original holder against it, under an assignment of property by the maker: *Held*, that the plaintiff cannot recover, but will be non-suited.

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HUDSON VS. PERRY ET AL.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE  
THEREOF PRESIDING.

Where judgement is rendered against a debtor, who is returned not found on a *fieri facias* and *ca. sa.*, and the bail fails to produce him when called on, judgment will be rendered against the bail for the amount of the debt, on motion, after giving him ten days notice in writing, and on the exhibition of the returns of not found, on the writs of *fieri facias* and *ca. sa.*. It does not follow, that when the principal debtor leaves the state without the leave of the court, the penalty of the bail bond attaches absolutely.

## CASES IN THE SUPREME COURT

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March, 1835.

HUDSON  
vs.  
PERRY ET AL.

The surety has still the right to surrender him, at any time before judgment against himself, on the bond.

The principal obligations assumed by the surety, are to pay the amount of the judgment rendered against the debtor, or to surrender him in execution.

The neglect or refusal of the surety to surrender the debtor in execution, is to be taken as *prima facie* evidence that the latter has departed from the state, and the bail bond is thereby become forfeited.

But the bail or surety has still the right to discharge himself by a surrender of the debtor, until final judgment is entered, and the debtor is considered in law as in the friendly custody of his surety, who, in case of escape, has at any time a right to arrest him by the aid of legal process.

The plaintiff obtained a judgment against the defendant, Perry for six hundred dollars, with interest and costs. Judgment was signed 2nd November, 1831. Perry had given bail at the commencement of the suit, and the bond was transferred, to the plaintiff by the sheriff.

Two writs of *fieri facias* were issued on the judgment, upon which the sheriff returned, that the defendant was not to be found in the parish, and that he had called on his bail to show property, who failed to do so.

A *ca. sa.* issued, upon which the sheriff returned, that having made the necessary inquiries to find the defendant, he called on his bail to produce him, who failed. This last writ was returned the 4th April, 1833.

On the 6th April, the plaintiff's attorney gave notice, in writing, that at the end of ten days from the service of this notice, he should move the court for judgment against the persons who signed as bail, for the amount of the original debt, interest and costs.

The defendants admitted their signatures to the bail bond, and pleaded a general denial. On exhibiting the record of the suit and judgment against Perry, with the several writs of *fieri facias* and *ca. sa.*, and the returns thereon, and after hearing arguments of counsel, the court was of opinion the proof was insufficient to authorise a recovery. Judgment of

non-suit was rendered against the plaintiff, from which he appealed.

EASTERN DIST.  
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HUDSON  
vs.  
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*Labauve*, for the plaintiff.

*Davis, contra.*

*Bullard, J.*, delivered the opinion of the court.

The appellees in this case became the bail of one Perry, who had been arrested at the suit of Hudson, the appellant. Judgment was rendered against Perry, for six hundred dollars, and a writ of *fieri facias* which issued thereon, having been returned, no property found, a *capias ad satisfaciendum* was sued out, upon which the sheriff returned, that the defendant was not found in the parish, and that he had called on the bail to produce him, which they had failed to do. Upon the exhibition of this proof, the plaintiff moved the court for judgment against the bail, after having given due notice, in writing, of his intended motion. In answer to the motion, the appellees denied all the allegations therein contained, except that they signed the bond. The court being of opinion that the plaintiff had failed to make out his case, gave a judgment of non-suit, and he appealed.

It is urged that the plaintiff is not entitled to recover of the bail, without proof that the principal had left the state, without leave of the court, according to the conditions of the bond, and no such proof having been given, the judgment of the District Court is correct.

The Code of Practice provides, that "if the surety fails to present the person of the debtor, on execution of the definitive judgment rendered against him, the plaintiff shall be entitled to judgment against such surety for the amount of the judgment rendered against the debtor, by moving for it before the court by which it was rendered, after exhibiting the act of surety transferred to him by the sheriff, provided written notice of the intended motion be given to such surety, ten days previous to taking judgment against them."

*Article 235.*

Where judgment is rendered against the debtor, who is returned not found on a *fieri facias* and *ca. sa.*, and the bail failed to produce him when called on, judgment will be rendered against the bail for the amount of the debt, *on motion*, after giving him ten days' notice in writing, and on the exhibition of the returns of not found on the writs of *fieri facias* and *ca. sa.*.

It does not follow, that when the principal debtor leaves the

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state without the leave of the court, the penalty of the bail bond attaches absolutely. The surety has still a right to surrender him, at any time before judgment against himself on the bond.

The principal obligations assumed by the surety, are to pay the amount of the judgment rendered against the debtor, or to surrender him in execution.

The neglect or refusal of the surety to surrender the debtor in execution, is to be taken as *prima facie* evidence, that the latter has departed from the state, and the bail bond is thereby become forfeited.

But the bail or surety has still the right to discharge himself by a surrender of the debtor, until final judgment is entered, and the debtor is considered as in the friendly custody of his surety, who in case of escape, has at any time a right to arrest him by the aid of legal process.

The record exhibits evidence of all the facts upon which a recovery of the surety is made to depend by the article above recited. A demand was made on the sureties to surrender their principal, on execution of the judgment rendered against him. But the defendants contend that something more is required in order to entitle the plaintiff to recover; that he must show that the principal had actually left the state, as that is the condition of the bond. It is true, such is the condition of the bond; but it does not follow, that even when the principal leaves the state, without the leave of the court, the penalty of the bond attaches absolutely. The surety has still the right to surrender him at any time before the judgment is pronounced against himself, on the bond. *Code of Practice* 231. All these articles must be taken together in deciding upon the liability of the surety. Under the act of 1805, it was held by this court, that the judgment creditor could not recover on a bail bond, without proving the departure of the principal from the state. *10 Martin, 363.*

But the provisions of the act of 1805, regulating the practice of the Superior Court were different from those of the *Code of Practice*, in this particular. By that act judgment might be rendered against the bail if it should appear that the condition of the bond had been broken. According to the provisions of the *Code of Practice*, this court held, in the case of *Walls vs. Smith*, 3 *Louisiana Reports*, 498, that the principal obligations assumed by the surety are to pay the amount of the judgment rendered against the debtor or to surrender him in execution.

The *Code* has pointed out what shall be taken as sufficient evidence of a breach of the conditions of the bond, and has made the recovery of the bail to depend on the exhibition of such proof. According to our construction of the article first recited, the neglect or refusal of the surety to surrender the debtor in execution, is to be taken as *prima facie* evidence that he had departed from the state, and the bond has become forfeited. The surety still has right to discharge himself, by a surrender of the debtor, until final judgment is entered, and the debtor is considered in law, as in the friendly custody of

his surety, who, in case of escape, has at any time a right to arrest him, by the aid of legal process. In this case, we are of opinion that the plaintiff has brought himself within the law and is entitled to recover.

EASTERLY DIST.  
March, 1835.

GOODALE  
vs.  
HIS CREDITORS.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that the plaintiff recover from the defendants Jean Baptiste Rills and Frederick A. Davis, the sum of six hundred dollars, together with the costs of the suit of *Hudson vs. Perry*, and the costs of their motion in the District Court and of this appeal.

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#### GOODALE vs. HIS CREDITORS.

##### APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

Where the meeting of creditors for the appointment of syndics closed on the 9th of July, and an opposition was filed by a creditor, on the 22d of the same month, to the appointment of one of the syndics, and alleging various grounds of error in the proceedings: *Held*, that as *ten entire days had expired in the interim*, after deducting Sundays, the opposition came too late.

It is required of creditors who oppose the appointment of syndics, on the ground of illegality in the proceedings, to file their opposition within ten days next following the appointment, counting from the day the proceedings closed before the notary.

The deliberations of creditors in the appointment of syndics, become absolute, without being homologated, after the lapse of ten days from that on which the deliberations closed before the notary, unless set aside by a timely opposition.

**EASTERN DIST.** If the proceedings of creditors, in the appointment of syndics, are void  
*March, 1835.* upon their face, they can have no effect, and no formal opposition is  
 necessary.

**GOODALE**  
 vs.  
**MIS CREDITORS.**

The law does not require that the *ten days* within which an opposition to  
 the appointment of syndics must be filed, should be *judicial days*.

This case commenced with the opposition of A. Hodge, jr.,  
 a mortgage creditor of the insolvent debtor, made to the  
 proceedings had before the notary, in the appointment of  
 syndics.

The surrender of the insolvent's property was accepted by  
 the judge, on the 31st May, 1834, and a meeting of the  
 creditors ordered to be held on the 9th of July following,  
 before a notary public, to deliberate on the affairs of the  
 debtor. The proceedings of the creditors, in presenting their  
 claims and voting for syndics, commenced the 3d of July,  
*closed the 9th*, and were returned into the clerk's office of the  
 Parish Court, on the 15th of the same month. On the 19th  
 of July, A. Fisk, Watt & Co., filed their opposition to the  
 proceedings, before the notary ; and on the 22d, Andrew  
 Hodge, jr. filed his opposition and claimed to be syndic  
 jointly, with J. E. Whitall, who had been appointed by the  
 meeting. He alleged various defects and objections to the  
 proceedings of the creditors, and that he had a majority over  
 G. Burke, for syndic, and should be recognised in his stead.

On the 23d of July, 1831, J. E. Whitall and G. Burke  
 presented their petition to the parish judge, alleging they  
 were appointed syndics by a majority of the creditors of N.  
 Goodale, in number and amount, and prayed to be authorised  
 to take possession and sell the ceded property on the terms  
 voted by the creditors, which, on the 23d August following,  
 was ordered accordingly.

On the 26th of August, the counsel of A. Hodge, jr.  
 filed grounds, and took a rule on the syndics, to show cause  
 why the order made on the 23d, should not be set aside,  
 on the following grounds :

1. Because no legal notice was given.
2. The opposition was not set for trial.

3. The court was not in session, and no trial could be had but by consent.

4. The proceedings of the creditors are illegal and void upon their face.

The parish judge, after hearing the arguments of counsel, discharged the rule, and the opposition was dismissed, as not having been filed in time. From this judgment the opponent appealed.

*Strawbridge & Slidell*, for the syndics.

*Peirce*, for the appellant, contended that the court was required to pronounce a judgment on motions to homologate the nomination of syndics. *Code of Practice*, article 755.

2. All judgments must be entered on the minutes of the court. In this case there is no judgment homologating the appointment of syndics. *Code of Practice*, 543, 544.

3. The party has a right to make his opposition, although the legal delay has expired, and until homologation is pronounced. *Curia Philippica*, p. 150.

4. The opposition in this case was, therefore, filed in time, even if ten days had elapsed since the close of the proceedings before the notary.

5. The homologation of the proceedings did not take effect by the mere lapse of time, but only from judgment pronounced, as the action and consideration of the court thereon was required.

6. The days on which courts are not to be held, cannot be counted as judicial days. *Code of Practice*, 318.

*Martin, J.*, delivered the opinion of the court.

This case comes before us on the appeal of Andrew Hodge, jr., an opposing creditor, from the order of the parish judge, homologating the proceedings of the creditors of the insolvent, before the notary, in the appointment of syndics. He opposed the proceedings and the appointment of syndics on various grounds, and urges in this court that the homologation was untimely, and therefore illegal, and should be set aside.

EASTERN DIST.  
March, 1835.

GOODALE  
TO  
HIS CREDITORS.

## CASES IN THE SUPREME COURT

EASTERN DIST.  
March, 1835.

GOODALE  
vs.

HIS CREDITORS.

Where the meeting of creditors for the appointment of syndics closed on the 9th of July, and an opposition was filed by a creditor on the 22d of the same month, to the appointment of one of the syndics, and alleging various grounds of error in the proceedings : Held, that as ten entire days had expired in the interim, after deducting Sundays, the opposition came too late.

It is required of creditors who oppose the appointment of syndics, on the ground of illegality in the proceedings, to file their opposition within ten days next following the appointment, counting from the day the proceedings closed before the notary.

The deliberations of creditors in the appointment of syndics become absolute, without being homologated, after the lapse of ten days from that on which the deliberations closed before the notary, unless set aside by a timely opposition.

1. The counsel for the appellant contended that the opposition was filed in due time, and should have been received.
2. That the proceedings appointing syndics must be homologated in open court, and does not become definitive and complete by the mere lapse of time.
3. That the proceedings before the notary are void on the face of them.
4. That all judgments must be entered on the minutes of the court.
5. That the days on which there is no court, are not to be reckoned as part of the time within which the opposition of a creditor is to be filed.
6. That the opposition was in time, as no judgment of homologation had been pronounced, and an opposition had been made within the ten days, and had not yet been acted on.

The meeting of the creditors for the appointment of syndics was closed the 9th of July, and the opposition was filed on the 22d of the same month: between these two periods, twelve days intervened: deducting two days for Sundays (more could not have elapsed) and ten entire days expired in the interim. The opposition was, therefore, filed after the expiration of ten days allowed by law.

I. The 18th section of the insolvent law of 1817, 2 *Moreau's Digest*, 429, requires creditors who deem it necessary to oppose the appointment of syndics on the ground of illegality in the proceedings, to file their opposition *within ten days* next following the appointment. It is, therefore, clear, that the opposition filed in this case, came too late.

II. The 17th section of the above act provides that it shall no longer be necessary to have the deliberations of the creditors in the appointment of syndics homologated. From this provision it clearly results that the appointment of syndics by the creditors becomes absolute, after the lapse of ten days from the day on which their deliberations are closed, unless it is set aside by the timely opposition of a creditor, which

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must be filed *within* the ten days allowed after the meeting of the creditors is closed.

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III. If the proceedings of the creditors be void on the face of them they cannot have any effect, and the rejection of the opposition of the appellant will not render them legal and binding.

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If the proceedings of creditors in the appointment of syndics are void upon their face, they can have no effect; and no formal opposition is necessary.

IV. As regards the entry of judgment, it follows from what has been already said, that if no judgement of homologation is required since the promulgation of the Code of Practice, consequently in the present case none was rendered or required to be rendered. Hence no judgment of homologation could be entered on the minutes of the court.

V. The insolvent act of 1817, already referred to, does not require that the ten days, within which the opposition should be filed, must be *judicial days*. But in this case it is not alleged, nor is it shown that the opposing creditor had *not* ten judicial days within which to make his opposition. The record shows that the court was sitting, after the proceedings before the notary were closed, and before and after the day on which the opposition was filed. The presumption, therefore, is strong that the July term of the court did not close until after the opposition was filed.

The law does not require that the *ten days*, within which an opposition to the appointment of syndics must be filed, should be *judicial days*.

VI. The fact that the timely opposition had been made by another creditor, did not authorise the filing of the opposition of the appellant after the expiration of the legal delay. Neither of the applications could have been followed by a judgment of homologation, because none was necessary. If an opposition made in due time appears groundless, the judgment is, that it be rejected, not that the appointment of the syndics be homologated. If it is shown that the opposition is well founded, judgment must be rendered setting the appointment aside. Both these judgments must be pronounced on timely oppositions. It is true that when the neglect or omission to make an opposition or an application, brings with it as a consequence, some act of the court, or the party; as a judgment by default, or the like; the party may avert this consequence before the act be done. But in this case the law required the application to be made within

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EASTERN DIST. a given delay, and the consequence of neglect is the rejection  
March, 1835. of the application; the delay is fatal.

**PRITCHARD**

**ET UX.**  
**vs.**  
**CITIZENS' BANK.** It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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**PRITCHARD ET UX. vs. CITIZENS' BANK.**

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

When parties to a marriage contract do not stipulate and fix their rights by a matrimonial convention, they are considered as having left those rights to be regulated by such laws as may be enacted from time to time during the continuance of the marriage: *Held*, also, that laws authorising the alienation of the dotal property of the wife, and giving her power to mortgage her property and bind herself *in solido* with her husband, are constitutional, and may be applied to marriages or marriage contracts, entered into previously to their passage.

Parties having married in another state, and removing to this, their rights, concerning any property they may afterwards acquire, are to be governed and regulated by the law of their domicil.

So, as to the rights of either spouse, in the succession of the other, they will be tested, *not* by the law in force at the time of the marriage, but by that existing at the time the succession is opened.

The legislature has the power to remove or modify the legal capacities of minors or married women, as may be deemed expedient. Incapacities and disabilities are creatures of the law, and may at any time be removed or modified by it *eadem modo*.

This is an action to require the Citizens' Bank, in New-Orleans, to receive certain *dotal* property on mortgage for bank stock, subscribed by the plaintiffs in said bank.

The plaintiffs allege they subscribed in the name of Mary Ross Pritchard, for seven hundred and fifty shares of stock, and in due time tendered to the directors of the Citizens' Bank, a certain lot of ground with eleven dwellings and two other houses, and their appurtenances thereon, to be mortgaged as a security for their stock, in pursuance of the provisions of the bank charter. They allege that this property belongs to the wife, in her own right, and was constituted *dotal property* in the marriage contract between them ; and that it is sufficient in value to secure said stock. They further show, that the directors refuse to receive it on mortgage, alleging that this lot is dotal property and cannot be legally mortgaged or alienated. "Now, your petitioners charge, that by a law of the state, approved the 5th of February, 1829 ; and by the 25th section of the charter of said bank, all legal impediments to mortgaging said property have been removed."

The bank, by its counsel, answered, "that the property proposed to be mortgaged, being *dotal*, cannot legally be mortgaged or alienated ; that the law of the state on which the plaintiffs rest their right to mortgage this property, is unconstitutional, inasmuch as it impairs the obligations and privileges resulting from the marriage contract previously entered into between the petitioners ; and, further, that the 25th section of the bank charter is not applicable to marriage contracts made before the date of the charter."

Upon these pleadings and issues the parties went to trial.

The marriage contract between the plaintiffs is in evidence. It is dated June 6th, 1818, and constitutes the wife's interest in the property now in question, *as dower*.

On the 5th of February, 1829, the legislature passed an act "empowering the petitioners to dispose of this lot by *deed of sale, or otherwise*." The Citizens' Bank charter is dated April 1st, 1833, the 25th section of which, provides, "that in all contracts or mortgages entered into, with the corporation, if the person be married, it shall be lawful for the wife to join in the said contract or mortgage, and bind herself conjointly and *in solido*, with her husband, and *to renounce*,

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EASTERN DIST. *cede, mortgage, &c., her rights, privileges or property, as well dotal as of any kind or nature whatsoever.*"  
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The district judge considering the property in question as dotal, and in constituting it as such, the parties intended to subject themselves and the property to the disabilities which the law then attached to them and it. But the removal of those disabilities does not impair the contract between them or retroact on their rights. Regarding the right and power of the legislature to pass the act of 1829 and the provision in the bank charter in 1833, under the constitution of the state, there does not seem to be any conflict or opposition between them. Judgment was rendered for the plaintiffs and the defendants appealed.

*Eustis*, for the plaintiffs.

*Soulé* and *Morphy*, for the defendants.

*Martin, J.*, delivered the opinion of the court.

This is an action to compel the Citizens' Bank to receive a certain lot of ground with the buildings thereon, part of the dotal property of the wife of the plaintiff, as security for seven hundred and fifty shares of stock, subscribed by the plaintiff and wife in said bank, according to the terms of its charter. The bank refused to receive the property, on the ground that it being the *dot* of his wife, was not susceptible of mortgage. From a decree rendered in favor of the plaintiffs, the bank has appealed to this court.

The counsel for the plaintiffs in support of their demand, relies on a private act of the legislature, passed for the special benefit of his clients, approved the 5th of February, 1829, (*Session Acts of 1829, page 136,*) by which R. O. Pritchard and Mary Ross Pritchard his wife "are authorised and empowered to dispose of by deed of sale or otherwise," the houses and lot now in question, "any law to the contrary notwithstanding;" and he also relies on the 25th section of the charter of said bank, which *authorises* married women to bind themselves *in solido* with their husbands and mortgage their *dotal* and other property to the bank.

On the other hand the counsel for the bank contend, that the constitution forbids the application of these acts, to the case of the plaintiffs, who were married in 1818, anterior to their enactment; and because by the marriage contract between them, this property is declared to be dotal, and as such was inalienable by the existing laws, except in certain cases, none of which are pretended to be like the present one.

The constitutionality of the private act and the 25th section of the bank charter alluded to, so far as they are sought to be applied to the case before us, are the only points presented for the consideration of the court.

When the parties to a marriage contract do not choose to stipulate and fix their rights by a matrimonial convention, they are considered as having left or wished those rights to be regulated by the law of the land. They are not, however, to be governed by the laws which are in existence at the place and at the time of their union, but by such laws for the time being, as may be in force during its whole continuance.

This court has decided and held in the case of *Saul vs. His Creditors*, 5 Martin, N. S. 569, that the parties having removed from the state of Virginia, in which they were married, to the state of Louisiana, their rights concerning any property afterwards acquired, are to be regulated by the law of the place to which they had removed. So future rights accruing thereafter are tested by the laws which are in force at the period when they accrue; as to the rights of either spouse in the succession of the other, they will be tested not by the law that was in force at the time of the marriage, but at the time the succession is opened.

It is said the private act and the provision in the bank charter relied on, impose the obligation (or create the right, which is the same thing) resulting from the contract of marriage, inasmuch as they put the wife *in duriori casu* by depriving her of the security which she had under the marriage, for her dotal property, by protecting it from waste through the influence of the husband and the too great confidence of the wife.

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When parties to a marriage contract do not stipulate and fix their rights by a matrimonial convention, they are considered as having left those rights to be regulated by such laws as may be enacted from time to time, during the continuance of the marriage: *Held*, also that laws authorising the alienation of the dotal property of the wife, and giving her power to mortgage her property, and bind herself *in solido* with her husband, are unconstitutional, and may be applied to marriages or marriage contracts, entered into previously to their passage.

Parties having married in another state, and removing to this, their rights concerning any property they may afterwards acquire, are to be governed and regulated by the law of their domicil.

So, as to the rights of either spouse in the

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succession of the other, they will be tested, not by the law in force at the time of the marriage, but by that existing at the time the succession is opened.

It is true the incapacities under which the law places minors and married women are all intended for the benefit of those persons; but as time and circumstances occasionally render these incapacities injurious to them, it is in the power of the legislature to remove or modify the disabilities under which they labor.

When the United States took possession of this country the laws of Spain protracted the period of minority until the expiration of the twenty-fifth year. The legislature of the territory modified this provision of the Spanish law, and provided that minority should cease at the age of twenty-one years. No injury ensued in regard to those persons then between the ages of twenty-one and twenty-five years, yet their capacity and power were enlarged and increased, and it is probable some of them may have made an indiscreet use of the faculty given them to dispose of their property and to manage their affairs themselves. This misfortune, if it were such, was no doubt more than compensated by the ability of the majority of them to exert their industry and acquire wealth and experience in business. We are never to presume that the legislature acts in any case or passes any law without proper consideration or deliberation. Circumstances may have rendered it expedient that the plaintiffs should be enabled to dispose of a lot of ground such as the present, which was part of the dowry. The interest of the parties required it; the vigor of mind and discretion of the wife and her prudence, most likely justified the interference of the law-making power.

The extension of the commerce of the state, calling for an increase of banking capital, the general assembly deemed it proper to facilitate it by removing some of the incapacities under which married women labored in regard to certain rights and contracts and the inalienability of the dowry. It

The legislature has the power to remove or modify the legal incapacities of minors and married women, as may be deemed expedient to attain the objects it had in view.

Neither the special act, nor the provisions of the bank charter authorise the alienation of any property without the consent of all the parties interested and concerned. They neither violate nor impair any right or obligation; and neither places any of the parties *in duriori casu*. Incapacities and disabilities are all creatures of the law, and may at any time, be removed or modified by it, *eadem modo*.

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ent. Incapaci-  
ties and disabili-  
ties are creatures  
of the law, and  
may at any time  
be removed or  
modified by it  
*eadem modo*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where claimants are in possession of property attached, it lies on the attaching creditor to show title in the defendant.

Where the whole matter is left to the jury, who, under instructions from the court, of which the adverse party did not complain, find a verdict against them, and where even the evidence leaves the case doubtful, the verdict will not be disturbed.

This is an action to recover from Page, as endorser of a promissory note, the sum of one thousand nine hundred and thirty-nine dollars forty-four cents. The plaintiff alleged that the defendant was an absentee, but had property in the state, and was part owner of the steam-boat Baltic, which he caused to be attached, in the hands of the other owners, who claim the entire ownership of the boat.

R. Miller and others, residing in Pittsburg, Strader & Co. and Baird & Baldwin, residing in Louisville, Kentucky, intervened and claimed the Baltic as their property, alleging that Page is not, and was not at the time of the attachment,

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a part owner of said boat. They pray to be decreed the true owners, and for judgment against the plaintiffs for damages and costs. The counsel appointed to represent the absent defendant pleaded a general denial.

The plaintiff proved his claim against the defendant, Page. To prove the interest of the latter in the steam-boat Baltic, he gave in evidence the enrolment of the boat on the 14th of February, 1833, at Louisville, Kentucky, by which it appeared Haines & Geddes, of New-Orleans, were part owners, and that Baird & Baldwin were not named.

Two letters of Page, the defendant, to Haines & Geddes, written from Louisville, in January, 1833, giving a long statement of his pecuniary affairs, were also in evidence to prove his interest in the steam-boat. He remarks, that he "must protect a bill of J. B. Page, for four thousand four hundred and fifty dollars. Now, to do this, I have got a regular transfer of one-fifth of the steam-boat Baltic, made out at the custom-house, this day, to you, by Baird & Baldwin, (I think I told Mr. Geddes, that I was *one-fifth owner*, but that it was in Baird & Baldwin's name,) which bill of sale and transfer I now send to you and wish you to enclose to me two bills of exchange, one for two thousand, and one for two thousand five hundred dollars, drawn on Haines & Geddes, by John Geddes, both to the order of Dearborn & Co. I do not wish you to think that I wish you to become the *purchaser of one-fifth of the Baltic*. I only want to keep things snug between us, and safe under all circumstances, and am taking this course to save John's bill. The Baltic leaves this for New-Orleans, in the early part of next month ; when you see her, you will not be ashamed to be called an owner. She is a very fine boat and worth twenty-eight or thirty thousand dollars."

On the 15th February, 1833, Page writes as follows, to Haines & Geddes : "Baird & Baldwin will be sustained and go on with their business. I do not know how soon I may come to an arrangement with the bank, but not until I know the extent of my losses and not until I am out of responsibilities. The Baltic goes down with a full cargo

*and her papers making you one-fifth owner.* I hope you have sent me the two bills for two thousand, and two thousand five hundred dollars, to enable me to pay A. W. & Co's bill. It is not due until March," &c.

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The intervenors offered evidence to show the title of the boat was in them at the time of the seizure.

The cause was submitted to a jury. The court instructed them, that if they believed Page was the real owner of any portion of the steam-boat Baltic at the period of seizure under the attachment, their verdict ought to accord with that belief.

The jury returned a verdict for the intervenors. Judgment was rendered declaring the intervenors to be the true owners of the steam-boat Baltic. The plaintiff, after an unsuccessful attempt to obtain a new trial, appealed:

*Worthington*, for the plaintiff.

*Preston, contra.*

*Bullard, J.*, delivered the opinion of the court.

The plaintiff having sued S. K. Page, an absentee, caused an attachment to be levied on the steam-boat Baltic, as the property of his debtor. Miller and others intervened and claimed the steam-boat as their sole property and prayed for its release. The case, as between the attaching creditor and the claimants, was tried by a jury, and judgment being rendered in their favor, the plaintiff appealed.

Where claimants are in possession of property attached, it lies on the attaching creditor to show title in the defendant.

There is no evidence to show that Page was ever in possession of the boat or exercised any control over it as owner or part owner. But it is contended by the appellant, that the share which appears in the enrolment of the boat, as the property of Haines and Geddes, belonged in fact to Page, and was held by them for Page, under a transfer from Baird & Baldwin. It seems probable, that Page was desirous of procuring from Baird & Baldwin, a transfer of a part of their interest in the boat to Haines & Geddes, with a view of procuring a credit with that house. But it is expressly shown

Where the whole matter is left to the jury, who under instructions from the court of which the adverse party did

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not complain, find a verdict against them, and where even the evidence leaves the case doubtful, the verdict will not be disturbed.

that they declined to accept such a sale and transfer. Whether Page was really interested in the boat, and his interest covered under the name of Baird & Baldwin, is left perhaps doubtful. But the whole matter was left to the jury, who under instructions from the court, of which the appellants do not complain, found for the claimants, and their verdict is not so clearly contrary to the evidence as to authorise us in disturbing it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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## SLOO &amp; BYRNE vs. SAME.

Bullard, J., delivered the opinion of the court.

This case cannot be distinguished from the preceding one of Thayer *vs.* the same parties, *ante* 135. The evidence in relation to the title of the claimants, is the same, and a similar judgment was rendered below.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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MAILLAN *vs.* PERRON ET UX.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where the transferor of a mortgage by private act, afterwards goes before a notary public and two witnesses, with a copy of the act of transfer and acknowledges that the act of which that is a copy was his proper act, with his signature affixed to the original: *Held*, that on presenting this instrument, together with a copy of the act of mortgage, the transferee is entitled to an order of seizure and sale.

Where the tenor of the private act is specially set out in the recognitive act, the production of the primordial title is dispensed with.

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Where a mortgage debtor offers certain receipts as evidence of payments made to the assignor of the mortgage, but which bear date more than a year before any payments were due; and he is interrogated on oath by the transferee of the mortgage, to say whether the receipts were not given for money won at play and gambling; and if not, what was the consideration: *Held*, that the party cannot be dispensed by the court from answering; and that the character of the receipts and the circumstances under which they were given should be inquired into.

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This suit comes up on an injunction. Perron and wife are the transferees of a mortgage by act under private signature, which Jean Maillan gave on a tract of land in West Baton Rouge, to secure the payment of the balance of the purchase money to J. B. Guidry, his vendor. The act of sale and mortgage is dated the 22d November, 1830. On the 25th October, 1831, Guidry transferred the debt and mortgage on Maillan to Perron and wife, by private act, executed double, and recorded in the parish judge's office in West Baton Rouge. The parties took an authentic copy, and went before a notary public and two witnesses, and on the back of it, the transferor acknowledged the original act under private signature, of which that was a copy, to be his act, with his proper signature affixed.

Upon this act of transfer, and a copy of the mortgage, Perron and wife, as transferees of Guidry, obtained an order of seizure and sale against the land, for eight hundred dollars, the price due:

Maillan obtained an injunction staying the sale. He alleges the transfer of the mortgage is fraudulent and collusive; that he has more than paid the balance, which was eight hundred dollars, due in all the month of March, 1832, as appears by four receipts of Guidry, dated the 9th and one the 10th of February, 1832.

The receipts are four in number and express on the face of them, to be for payments made on account of the land in question, but bear date more than a year before any payment was due. They are endorsed, recorded in the parish judge's

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March, 1835. seizure and sale was obtained.

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Perron and wife, in answer to the injunction, pleaded a general denial, and that the receipts set up as evidence of payments to their transferor are not binding on them, and that they were obtained through fraud, error and deceit, on the part of said Maillan; and they were given for gambling and at gambling, and without consideration, and are null and void. They pray that the injunction be dissolved, with damages, expenses and costs.

In a supplemental answer, the defendants propounded interrogatories to Maillan:

1. "Is or not the consideration of the receipts annexed to your petition, for money won at play or gambling?"
2. "If not, state what was the consideration of said receipts."

These interrogatories were ordered to be answered, on oath, in open court, on a day fixed.

The plaintiff objected to answering, on the ground that the interrogatories were irrelevant to the issue; whereupon, the court ordered that they be set aside and the plaintiff dispensed from answering.

On the trial, the district judge decided, that as no authentic evidence of the transfer of the mortgage was exhibited, the order of seizure and sale was improvidently granted. Judgment, perpetuating the injunction, was rendered, from which, after an unsuccessful attempt to obtain a new trial, the defendants in injunction appealed.

*Hiriart and Ogden*, for the plaintiff.

*Labauve*, for the defendants.

1. The judgment of the District Court is erroneous; the injunction was maintained on a ground not at issue.

2. The granting of the injunction was entirely predicated on the plea and ground of payment, and not on the irregularity of the order of seizure and sale, if any there was; which payment said Maillan failed to establish in a satisfactory manner, so as to affect Perron and wife.

3. The court below erred in rejecting the interrogatories propounded to Maillan. Receipts can have no more force in law for gambling consideration, than notes for the same consideration.

4. The court below properly rejected the testimony offered to prove B. Guidry's signature, when the subscribing witnesses were in the neighboring parish.

5. This court should reverse the judgment below, dissolve the injunction with the general damages, and special damages proved.

*Bullard, J.*, delivered the opinion of the court.

The defendants and appellants, show for errors in the judgment and proceedings in this case; 1st. That the injunction was sustained on a ground not at issue, it being granted on the allegation of payments made on account of the debt, and not of any irregularity or want of sufficient evidence before the judge in chambers, where the order of seizure was granted; and 2d. That the court erred in rejecting certain interrogatories propounded to the plaintiff, relative to the consideration for which certain receipts were given.

I. The original transfer of the mortgage to the present plaintiff, appears to have been by act under private signature. The transferor afterwards went before a notary public and two witnesses, with a copy of the act of transfer and acknowledged, that the act of which that was a copy, was his proper act, and that his signature is affixed to the original. On presenting this instrument, together with a copy of the act of mortgage, the order of seizure was issued by the judge in chambers. We are of opinion that this instrument furnishes authentic evidence of the transfer, without any proof of the act *sous seing privé*. The tenor of that act is set forth; and according to article 2251 of the Code, the production of the primordial title is dispensed with, whenever the recognitive act specially sets forth its tenor. The effect of the transfer to a third person as it relates to the rights of the debtor, is a distinct question which does not arise in this case.

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Where the transferor of a mortgage by private act, afterwards goes before a notary public and two witnesses, with a copy of the act of transfer, and acknowledges that the act of which that was a copy, was his proper act, with his signature affixed to the original : Held, that on presenting this instrument, together with a copy of the act of mortgage, the transferee is entitled to an order of seizure and sale.

Where the tenor of the private act is specially set out in the recognitive act, the production of the primordial title is dispensed with.

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Where a mortgage debtor offers certain receipts as evidence of payments made to the assignor of the mortgage, but which bear date more than a year before any payments were due, and he is interrogated on oath by the transferee of the mortgage, to say whether the receipts were not given for money won at play and gambling ; and if not, what was the consideration : Held, that the party cannot be dispensed by the court from answering ; and that the character of the receipts, and the circumstances under which they were given, should be inquired into.

II. The defendants in their answer allege that certain receipts, given by their assignor, purporting to be for money paid on account of the debt in question, were obtained through fraud, error and deceit, and that they were given for gambling and at gambling. At the time the receipts bear date, no part of the debt in question was due. They are dated February 9th and 10th, 1831, and the second payment fell due in all the month of March, 1832, and the amount overruns that instalment. The court at first ruled the plaintiff to answer on oath, whether the consideration of the receipts was not for money won at play and gambling, and if not what was the consideration ; but afterwards, on motion of the plaintiff, rescinded the order and dispensed with his answers. To this, defendants excepted. We think the court erred in declining to inquire into the character of those receipts and under what circumstances they were given. They all bear date more than a year before any part of the money secured by the mortgage was due, and if founded on a gambling consideration, it is at least doubtful whether the law will lend its aid to render them available to the holder, either by direct action or by way of exception.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed ; and it is further ordered, that the case be remanded for a new trial, with directions to the court to require the answers on oath of the plaintiff, to the interrogatories annexed to the defendants' answer, and that the plaintiff pay the costs of the appeal.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Slaves inherited by the wife, in Mississippi, where the common law prevails, and according to the principles of which they become the property of the husband, are liable for his debts, when brought into this state, and may be attached and sold to satisfy his debts due here.

The attaching creditor, in order to repel the claim of an intervening party, is not bound to show that the property attached belongs to his debtor. It is sufficient to show that it does not belong to the claimants.

This is an action upon a judgment rendered in the state of Mississippi, against A. W. Breedlove and one Greenleaf, jointly and severally, for one thousand three hundred and thirty-nine dollars sixty-two cents, exclusive of interest and costs, in favor of the present plaintiff. Suit, by attachment, was commenced on said judgment in the First District Court of Louisiana, against certain slaves alleged to be the property of A. W. Breedlove, who is a resident of Texas.

The counsel for Breedlove pleaded the general issue; and denied specially that he was the owner of the slaves named in the attachment.

Susan W. Breedlove, wife of the defendant, intervened and claimed the slaves in question as her own property. She alleges they were decreed to her by a court in Mississippi, in 1833, and sent down to New-Orleans, consigned to J. W. Breedlove, to be sent to her at Brazoria, in Texas; and that they were attached in this suit, on their passage hither. She alleges these slaves were never in the possession of her husband, and that he has no claim to them.

Upon these issues, the parties went to trial. The evidence establishes that the intervenor is one of the heirs of John Clark, who was interested in some lands in Concordia. On the 28th November, 1828, the intervenor and her husband sold this land to Elijah L. Clark, for eight hundred dollars,

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in notes, which were loaned to Mrs. Margaret Clark, mother of the intervenor. Margaret Clark died in 1829, leaving as part of her estate, the slaves in question. At the probate sale of said estate, in 1830, these slaves were bought in by Thomas M. Newell, for and on account of the intervenor. Newell gave his note for the price, but which was never paid, and the slaves remained in possession of the administrator until 1834, when they were shipped at Grand Gulf to be forwarded to the intervenor, residing at Brazoria, in Texas. These slaves were in fact paid for, in the debt due by the estate of Mrs. Clark, arising principally out of the loan of the two notes of Elijah L. Clark, given in payment of the Concordia lands.

Marital rights in Mississippi, are shown to be governed by the principles of the common law, by which the moveable property of the wife belongs absolutely to the husband, as also the price of immoveables, when sold.

It was admitted that the title of the slaves was in Newell, as purchaser at the probate sale, but he never took them into possession or exercised any acts of ownership over them.

The district judge was of opinion that the slaves by the laws of Mississippi, became the property of the husband, and consequently liable to his debts.

Judgment was rendered in favor of the plaintiff for the amount of his claim, and that the slaves attached in the suit be seized and sold to satisfy said judgment. The intervenor appealed.

*Peirce and Jackson*, for the plaintiff.

*Gray*, for the appellant, contended that the slaves attached in this case were sold to Newell, and stand in his name who is a third person; and the validity of the conveyance to him and the propriety of his possession cannot be thus attacked collaterally. An action of nullity must first be brought to set aside the sale and have the property decreed to the defendant, before it can be attached for his debts. *4 Louisiana Reports*, 316. *5 Martin, N. S.*, 361, 634. *6 Ibid.*, 139, 325. *2 Louisiana Reports*, 214. *3 Ibid.*, 479. *5 Ibid.*, 126.

2. If the negroes were held in trust for Mrs. Breedlove, they cannot be seized here to satisfy a debt of her husband, and in Mississippi where the common law prevails, they could only be reached by her husband or his creditors by means of a bill in equity. 1 *Maddock's Chancery*, 447—82.

3. Admitting for a moment that they were purchased by money of her husband, the sale as before said, cannot be attacked thus collaterally in this state, and in Mississippi it could have been only done by filing a bill in chancery, and proving the fact by examination of the purchaser on oath, or in some other manner.

4. But the principal items in the account alleged to have been given in payment for the slaves, are two notes received from the sales of Mrs. Breedlove's lands in Louisiana, they were choses in action and not being reduced into possession by the husband, never ceased to be the wife's property. 2 *Blackstone's Commentary*, 443.

5. Neither a judgment nor a *fieri facias* of another state can give a lien which the courts of this state can recognise. 8 *Martin, N. S.*, 448.

*Martin, J.*, delivered the opinion of the court.

This case commenced by attachment of the defendant's property. Certain negroes being seized, the defendant's wife intervened and claimed them as her own property. Judgment was rendered rejecting her claim and she appealed. The appellant's counsel admits, the legal title to the slaves in question is in one Thomas M. Newell, a resident of the state of Mississippi, but urges that the equitable title is in the wife of the defendant, Newell not having paid the consideration for which they were sold. The appellant also shows that these slaves were part of the succession of her mother, Mrs. Margaret Clark, who died in 1829. The administrator of the estate of Mrs. Clark, received as the consideration of the sale of said slaves to Newell, a discharge from a debt of the deceased Mrs. Clark, resulting from the loan of two notes taken by the husband \_\_\_\_\_ of

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Slaves inherited by the wife in Mississippi, where the common law prevails, and according to the principles of which they become the property of the husband, are liable for his debts when brought into this state, and may be attached and sold to satisfy his debts due here.

the intervening party in payment of a tract of land in Concordia in the state of Louisiana, which belonged to her and was sold by the husband and wife. Newell promised, when he purchased the slaves, to convey them when he was liberated from the obligation of paying the price.

It is admitted that Newell, the intervenor, and her husband were at the time these transactions took place, all residing in the state of Mississippi, in which marital rights are regulated by the common law of England. According to the principles of the common law, the whole of the personal estate of the wife, in possession or in action, by the marriage, becomes the property of the husband; but the *choses* in action do not become absolutely his until he reduces them to possession.

On a full view of the case, it is the opinion of this court that the judge who tried the cause in the first instance, did not err in the conclusion to which he came.

The counsel for the appellant contends, and in this has, in our opinion, correctly urged, that the property attached was sold to Newell, and the title still stands in his name, who is a third party. Hence the validity of the conveyance to him, and the propriety or right to the possession taken under it, cannot be collaterally affected in the present case. An action must be brought to have the sale to Newell set aside, and the property decreed to belong to the defendant. In support of these positions, he has cited the following authorities: 2 *Louisiana Reports*, 214. 3 *Ibid.*, 674. 5 *Ibid.*, 361. 5 *Martin, N. S.*, 634. 6 *Ibid.*, 329.

Admitting, as we have done, the correctness of the foregoing positions, it further appears by a document subscribed by the intervenor or her attorney, to her husband, she admits that he made the loan of the notes to her mother; and that he was the creditor to whom the debt was due by the estate, in consequence of the loan. Hence, it follows, as he paid the price which Newell had promised to pay for the slaves, it is to him that Newell is to reconvey. The attaching creditor, in order to repel the claim of an intervening party, is not bound to show that the property which is attached, belongs

The attaching creditor, in order to repel the claim of an intervening party, is not bound to show that the property attached belongs to his debtor. It is sufficient to show that it does not belong to the claimant.

to his debtor. It suffices to show that it does not belong to the claimant.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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DUFOUR vs. JANIN.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The proprietor has a right to cancel the bargain he makes with the undertaker, even in case the work has already been commenced, by paying the expense and labor already incurred, *and such damages as the nature of the case may require.*

But whether an undertaker be discharged for good cause or not, the contract is at an end. It ceases to be any longer the standard by which to estimate the value of the work done, but it may be given in evidence to show the estimate the parties had made of the work to be done.

This is an action on the balance of an account due for carpenters' work done for the defendant, amounting to thirteen hundred and twenty-five dollars, according to an account annexed.

The defendant averred, that the plaintiff contracted to erect a saw-mill and find the materials, according to a certain plan: that the price agreed on was three thousand dollars, and the work to be completed in four or five months. That a few days before the expiration of five months, he requested the plaintiff to leave the work; because of the delay and inefficiency of force employed, and the bad conduct of the petitioner, there was no possible chance to have the work completed within the time agreed on: that the plaintiff has received two thousand three hundred and two dollars,

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and the balance of the work done is worth about eight hundred dollars.

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He further states, that in consequence of the delay and disappointment, in not getting his mill erected within the stipulated time, he has suffered damages to the amount of fifteen hundred dollars.

He prays that the plaintiff's demand be rejected, and that he recover fifteen hundred dollars in damages and costs.

Upon these pleadings the parties went to trial. The cause was submitted to a jury. Testimony on both sides was produced to show the manner in which the work was executed. The judge charged the jury, that "if the defendant had sufficient reason to discharge the plaintiff, then the amount of the contract was to be considered by them as the whole value of the work: but if, on the contrary, he had not good reason to do it, the contract was at an end, and they were to value the work according to a *quantum meruit*."

The defendant excepted to the charge, and alleged there was no distinction in the article 2736 of the *Louisiana Code*, and that whether he had good reasons or not, the estimation of the work done, was to be made according to the contract, and not otherwise.

The jury, upon the whole evidence of the case, returned a verdict of four hundred and fifty dollars, with costs, for the plaintiff. From judgment rendered thereon, the defendant appealed.

*Buchanan*, for the plaintiff.

*Charles Janin*, in *propriâ personâ*, contra.

*Bullard, J.*, delivered the opinion of the court.

The plaintiff sues to recover the value of certain carpenters' work, done for the defendant. The defence set up is, that the work was done under a contract, for a stipulated price by the job, to be done within a limited time, and that the defendant, finding that the plaintiff was unable to complete the job, requested him to desist from the work, before the

time limited by the contract: that he has paid two thousand three hundred and two dollars, on account of the work; and finally, he claims fifteen hundred dollars damages, in reconvention. The jury, after allowing the credit of two thousand three hundred and two dollars, gave a verdict against the defendant for a balance of four hundred and fifty dollars, upon which judgment being rendered, he appealed.

The only question of law presented for our consideration arises on a bill of exceptions taken by the appellant, to the charge of the judge to the jury. The jury were instructed that if the defendant had sufficient reason to discharge the plaintiff, then the amount of the contract was to be considered by them as the whole value of the work; but if, on the contrary, he had not good reason to do it, the contract was at an end, and they were to value the work according to a *quantum meruit*. The defendant contended that article 2736 of the *Louisiana Code* makes no distinction, and that whether he had good reasons or not, the estimation of the work was to be made according to the contract, and not otherwise. The article relied on, declares that "the proprietor has a right to cancel at pleasure the bargain he has made, even in case the work has already been commenced, by paying the undertaker for the expense and labor already incurred, and such damages as the nature of the case may require." We do not discover in this article the distinction laid down by the court, much less the principle contended for by the appellant, that the contract, though cancelled is to be the exclusive standard of the value of the work done. Whether the undertaker be discharged for good cause or arbitrarily, the contract is not the less at an end. It ceases to be the standard by which the value of the work is necessarily to be tested, although this court has held that it may be given in evidence to the jury, to show the estimate which the parties had themselves made of the work to be done. We think, therefore, that the court did not state the law with entire accuracy; but if the appellant complains that his own construction of the article in question, was not given in

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The proprietor has a right to cancel the bargain he makes with the undertaker, even in case the work has already been commenced, by paying the expense and labor already incurred, and such damages as the nature of the case may require.

But whether an undertaker be discharged for good cause or not, the contract is at an end. It ceases to be any longer the standard by which to estimate the value of the work done, but it may be given in evidence, to show the estimate the parties had made of the work to be done.

EASTERN DIST. charge to the jury, the court was clearly correct in declining  
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Upon the merits, we cannot discover by a careful examination of the evidence, that the jury was misled. The defendant himself does not deny the extra work charged, nor does he pretend that the work done under the contract, was unskillfully executed. According to his own principle, the verdict, in our opinion, was correct.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs

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PHILLIPS vs. NEWTON & CO.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF  
 NEW-ORLEANS,

Where acceptors of bills, on a condition to pay when certain other bills placed in their hands in the Mexican government, were collected, are sued on the acceptance : *Held*, that their liability depended on the fact of collection, or the want of that diligence, which, as faithful agents, they were bound to use ; *held also*, that when the evidence is such as to induce the jury to believe the acceptors profited or were benefited by the use of the Mexican bills, or that they were collected or used by the agent of the defendants, for his own purpose, the verdict of the jury for the plaintiff will stand.

This is an action against the firm of Newton & Co. as acceptors of two drafts, one drawn by G. Pollitt & Co. for five hundred dollars, and the other by Sterne & Co. for three hundred and fifty dollars forty-six cents ; these drafts were drawn, payable on the receipt of the proceeds of another draft put into the hands of Newton & Co. for collection, by the drawers, and accepted accordingly.

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The draft alluded to is described in the following receipt : "Received of Messrs G. Pollitt & Co. General Teran's draft on the custom-house at Matamoros, for one thousand three hundred and seventy dollars, bearing date the 8th November, the proceeds of which shall be placed to their account.

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*November 25th, 1831.*"

Newton pleaded the general issue. In answer to interrogatories, he said no part of the draft had been collected or received by either of the members of his firm, although he went himself in the month of May, 1832, to Matamoros to collect it. This part of the answer was objected to as uncalled for, but was suffered to go to the jury with the entire answer. The depositions and testimony of several witnesses were taken and read to the jury. After argument and explanations of the counsel, the jury returned a verdict for the plaintiff, allowing him the amount of his claim. From judgment rendered thereon, the defendants appealed.

*Preston, for the plaintiff.*

*Hoffman, contra.*

*Mathews, J., delivered the opinion of the court.*

The plaintiff sues as holder of two several bills of exchange one drawn by Pollitt & Co., and the other by A. Sterne, on the defendants and by them accepted, amounting together to the sum of eight hundred and fifty-three dollars, forty-six cents. The cause was tried by a jury in the court below, who brought in a verdict in favor of the plaintiff, for the whole amount claimed, on which judgment was rendered, and the defendants appealed.

These bills were made payable conditionally, in the event that the defendants should collect the amount of certain other bills on the government of Mexico, payable at the custom-house in Matamoros, the property of the persons who drew those accepted by the defendants.

Their liability to fulfil the obligation created by the acceptances now sued on, depends on two circumstances :

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Where acceptors of bills, on a condition to pay when certain other bills placed in their hands, on the Mexican government, were collected, are sued on the acceptance: *Held*, that their liability depended on the fact of collection, or the want of that diligence, which as faithful agents, they were bound to use; *held also*, that when the evidence is such as to induce the jury to believe the acceptors profited, or were benefited by the use of the Mexican bills, or that they were collected or used by the agent of the defendants, for his own purpose, the verdict of the jury for the plaintiff will stand.

1st. That they did collect the money on the bills which were put into their hands for collection; or, 2d. That they did not take such measures to have it collected, which as faithful agents, might be required of them. Interrogatories were put to them by the plaintiff in relation to those bills, and in the answers to those interrogatories, made by P. S. Newton, he denies that the drafts sent to his house were ever collected, although due diligence was used to make collection. An exception was made to that part of the answers which has reference to the failure to collect and the use of diligence, the defendants not having been interrogated in relation to those facts. The answers were, however, permitted to go to the jury in *toto*. Several witnesses were examined in the case, and on their testimony the jury found the verdict as above stated. The facts disclosed by these witnesses are such as may have induced the jury to believe that Newton & Co., whether directly collected or not, benefited by the drafts put into their hands for collection to the amount of their value, or that they were collected or used by their agent for his own purpose at the place of payment, notwithstanding the answers of the defendant to the interrogatories, admitted entire, and in either event the defendants are bound to pay the bills sued on. We consider the decision of the cause as depending principally on matters of fact, and do not perceive that they have been improperly found by the jury.

This view of the case renders it unnecessary to inquire into the exception taken by the plaintiff to the admission of the entire answers to his interrogatories, as not being strictly categorical and containing more than proper responses to his questions. Nor do we think the judge *a quo* erred in his charge to the jury.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Parole evidence of a fact, that should appear by entry on the minutes and of record, is irregular and novel; but the objection will not be noticed on appeal, when it does not seem to have influenced the decision of the cause.

Garnissees cannot offer the papers of a suit by a third person in evidence, to show the same property has been attached in their hands.

Garnissees cannot plead an open account in compensation of the value of the debtor's property in their hands, at the time it is attached by a creditor.

Compensation is of three kinds: legal, or by operation of law; compensation, by way of exception, and by reconvention.

Garnissees cannot set up a demand in compensation against the defendant, in the suit which does not take place by the mere operation of law.

So, where the garnissees owed the defendants a balance for account of sales and for property on hand, and set up a demand in compensation for notes and interest due them, as legatees of their deceased brother: Held, that this debt is not extinguished by compensation between them and the defendants; and the property and funds in their hands must be considered as liable to the plaintiff's attachment against the defendants.

This is an action by the acceptor against the drawers of a bill of exchange for eight hundred dollars, which was paid by the plaintiff.

The petition charges that the firm of Cole & Co., in St. Louis, on the 22d November, 1833, drew the bill in question, on the plaintiff, payable four months after date, which he accepted and paid at maturity, whereby said firm became indebted to him for the amount thereof. He alleges the defendants reside out of the state, but have funds and property in the hands of M. & P. Maher, which he attaches, and prays judgment for the amount of his claim, and that

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M. & P. Maher be summoned as garnishees, and required to answer, on oath, the following interrogatories :

1. Have you in your possession any property of Cole & Co., of St. Louis, the defendants in this suit ?

2. If yea, specify every part of the same, with its value, as minutely as the nature of the case will permit ?

3. Do you owe said defendants ; if yea, how much ?

In a supplemental petition the plaintiff alleges he accepted and paid the bill after it had been put in circulation and without receiving any value or having any funds of the drawers in his hands, but solely for their accommodation and benefit, which they have refused to repay to him.

The defendants pleaded a general denial.

The garnishees answered that they had no funds, but some little property of the defendants in their hands, which they had a right to return ; that the defendants were indebted to them in a large amount, for funds advanced, much more than the value of the property in their hands.

The district judge, on these pleadings, after hearing proof of the plaintiff's demand, rendered judgment against the defendants for the amount claimed ; and that it be paid and satisfied out of *the property attached*.

This judgment was rendered the 22d of May, 1834, and on the 24th, the counsel for the plaintiff took a rule on the garnishees, to show cause why judgment should not be entered against them for the amount of the debt, interest and costs, on the ground that their answer is insufficient and admits the facts in question.

2. That the answer is untrue, the garnishees having a large amount of defendant's property on hand, on which they have no privilege.

The garnishees answered, that the property of defendants on hand, amounted to three hundred and ninety-nine dollars fifty cents ; that defendants are indebted to the succession of their deceased brother, of whom they are legatees and successors in business, in the net sum of seven thousand one hundred and fifty-four dollars seventy-one cents, according to an account current annexed ; that, as appears by an account

of sales, also annexed, there is a balance due the defendants, of six hundred and ninety dollars eighty cents. They deny that they are indebted to the defendants in any manner, on a final settlement, but that the latter are indebted to them.

On hearing the rule it was made absolute, the district judge being of opinion the garnishees were liable for the amount of the judgment previously rendered against the defendants. From this decision, the garnishees appealed.

*Hennen*, for the plaintiff, contended that the garnishees were liable for the plaintiff's debt, as appeared from their own showing and the accounts rendered. They admit they have property and funds of the defendants in their possession, which are attached in this suit, and liable to the plaintiff's demand.

*Preston*, for the garnishees and appellants.

1. In this case, judgment is rendered against the garnishees for the amount of the plaintiff's demand against the defendants, on the ground that the garnishees being cited did not answer within ten days, in support of which is invoked the *Code of Practice*, articles 262, 263.

2. The provisions of the *Code of Practice* relied on, are not penal laws, but directory; prescribing the time and the mode in which the evidence of a garnishee, who is wholly disinterested between the parties, may be had.

3. The answers of the garnishees in this case, were filed before judgment, even by default, had been rendered; and therefore, in time to have prevented final judgment against them. *Code of Practice*, article 263.

4. The answers are very explicit, and show that the defendants owe them seven thousand one hundred and fifty-four dollars, while they had on hand property of the defendants, unsold, amounting to only three hundred and ninety-nine dollars fifty cents.

5. The proceeds of all the sales before the attachment, being in their hands, and the defendants at the same time

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EASTERN DIST. *April, 1835.* largely indebted to them, compensated in law the debt thus far, and which were in reality carried into account.

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6. There is no distinction in law or otherwise, between a debt due as universal legatee of a deceased brother, and that which is contracted by the party. They are each a debt due, are equally compensated by any funds of the debtor in the hands of the garnishee. *Louisiana Code*, 1602 and 2204.

7. The garnissees have a privilege on the property of the defendants in their hands, for advances made, as there is a balance due for advances made on all the consignments. *Louisiana Code*, 3214.

*Mathews, J.*, delivered the opinion of the court.

This is a case of attachment, in which M. & P. Maher were cited as garnissees, and interrogated as to property in their possession, belonging to the defendants, and also as to their indebtedness to him. The interrogatories were put not very formally, and the responses to them were not made in a manner so precise and categorical as they might have been. The court below rendered judgment against the defendants, and condemned the garnissees to pay the amount. From this judgment the latter alone appealed; consequently, the decision of that court is here to be examined only so far as it affects the interest of the garnissees.

Parole evidence of a fact that should appear by entry on the minutes, and of record, is irregular and novel, but the objection will not be noticed on appeal, when it does not seem to have influenced the decision of the cause.

We find on the record two bills of exception taken by the counsel of the garnissees: one to the opinion of the judge *a quo*, by which he admitted parole testimony of a fact which ought regularly to have appeared by entry on the minutes of his court; the other, to his refusal to admit in evidence the record of a suit offered to show that funds had been attached in their hands, to a large amount, by another person, assuming to be a creditor of the defendants, Cole & Co. previous to the attachment now in question. As to the first of these exceptions, it appears to us to be somewhat novel to allow oral evidence to establish facts which ought regularly to appear of record; but as the fact allowed thus to be proven, seems to have had no influence with the court in its final

decision of the cause, it needs no further notice. As to the second we are unable to discover what bearing on the case the record offered in evidence can have, according to the pleadings ; and if it can have none, it was properly rejected as irrelevant.

In coming to a decision on the merits of the case, some embarrassment is found, caused by the want of technicality in which it seems to have been conducted in the court below. The garnishees appear to be partners of a factorage or commission house, and their answers are sworn to by one of them alone. After having answered in the first instance, they by leave of the court, filed a supplemental and explanatory answer. This explanation or amendment was introduced, late in the cause, but being before any action of the court, in relation to the interest of the garnishees, it may be considered as having appeared in time ; at all events, it does not seem to have been opposed by the plaintiff. We will therefore consider the two answers as an entire thing, or as constituting a whole.

The answers contain a denial of funds belonging to the defendants in the hands of the garnishees, except some smoked beef and a few other articles which are stated to be worth three hundred and ninety-nine dollars fifty cents. They do not expressly deny being indebted to him, but allege that they are largely indebted to the respondents, and in support of this allegation they annex to their supplemental answer accounts of sales and an account current, showing a balance in their favor of seven thousand one hundred and fifty-four dollars seventy-one cents. From this statement it is seen that these answers are not technically categorical, but taking the facts disclosed in them as true, they show, that Cole & Co. were indebted to the garnishees in the sum of ten thousand three hundred and fifty-one dollars, the greater part of which sum was due at the time of levying the attachment ; much the largest portion of this amount appears to be owing to them as legatees of a deceased brother.

The amount owing by them to the defendants appears to be upwards of three thousand dollars, independent of the

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Garnishees cannot offer the papers of a suit by a third person, in evidence, to show the same property has been attached in their hands.

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Garnishees cannot plead an open account, in compensation of the value of the debtor's property in their hands, at the time it is attached by the creditor.

Compensation is of three kinds: legal or by operation of law; compensation by way of exception, and by reconvention.

According to these premises, we conclude that a correct decision of the case depends mainly on the doctrine established by our jurisprudence, in relation to compensation by mere effect of law. As regards the property of the defendants in the possession of the garnishees, at the time of levying the attachment it is clear that no compensation could take place, consequently it is subject to the claim of the attaching creditor. Respecting the money, reciprocally owing between the defendants and the garnishees, we have entertained perplexing doubts.

Compensation may be divided into three kinds: legal compensation or that which produces its effect *ipso jure*; compensation, by way of exception; and compensation by way of reconvention. *7 Toullier, No., 347.*

It is the first of these kinds of compensation which we have alone to examine in the present case.

The general rules which must direct us in this examination are those established by the Louisiana Code. The article 2204, declares that "compensation takes place of course by the mere operation of law, even unknown to the debtors; the two debts are reciprocally extinguished, as soon as they exist simultaneously to the amount of their respective sums," article 2205. "Compensation takes place only between two debts, having equally for their object a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable."

By the account exhibited in answer of the garnishees it is shown that their claim against the defendants, to the amount of nine thousand three hundred and ninety-seven dollars, is liquidated by promissory notes of the latter and conventional interest thereon, whilst the credit allowed to them appears only by an unsettled account, in which the former assume the place of debtors to the amount specified therein.

This account being rendered by them would be available for the defendants, as compensation by way of exception, if the garnishees were plaintiffs in an action; because it wants

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nothing but the assent of the creditors to its correctness, to make it certain and liquidated. Without such assent either express or implied it is devoid of the requisites, certainly as to quantity at least, and therefore is not liquidated in such a manner as to produce compensation by the mere operation of law.

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So, where the garnishees owed the defendants a balance for account of sales, and for property on hand, and set up a demand in compensation for notes and interest due them, as legatees of their deceased brother : Held, that this debt is not extinguished by compensation between them and the defendants, and the property and funds in their hands must be considered as liable to the plaintiff's attachment against the defendants.

The garnishees, consequently, appear before us as debtors to Cole & Co. to an amount largely exceeding the claim of the plaintiff, and as this debt is not extinguished by compensation between them and the defendants, it must be considered as the property of the latter, liable to be taken at the suit of their creditors, who are entitled to profit by their vigilance in opposition to the interest of the less careful and vigilant.

In support of the doctrine assumed in this decision, reference may be had to *7 Toullier, Droit Civil, Nos. 369 and 370.*

It is readily seen that the principles on which this case is decided, have no relation to those which would govern in cases respecting the rights and privileges of factors, to retain funds in their hands to satisfy their legal charges and advances made on the credit of property, consigned to them as commission merchants.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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BLANCHARD  
vs.  
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**BLANCHARD vs. COLE ET AL.**

**ON AN APPLICATION FOR A RE-HEARING.**

A debt due to persons individually, as legatees, cannot be offered in compensation of a demand due by them in their social capacity, as a commercial firm.

Compensation does not take place by operation of law between mutual claims, when one of them is unliquidated.

Garnishees cannot plead a demand against the defendant in compensation, by way of exception, to the right of the plaintiffs to recover.

In this case a re-hearing has been prayed for, and it is now before the court on this application. See the case *ante*.

*Preston*, for the garnishees and appellants, applied for a re-hearing, on the following grounds:

1. The point on which this case is decided, is new; it has never been discussed in our courts, and was not made or discussed, or the authority on which the decision is based was not cited at the bar, on the argument of the case.

The point on which the garnishees are made liable, is this: that the claim against them is not liquidated, and although their demand is liquidated by notes, it cannot be pleaded as an off-set against the unliquidated claim of the plaintiff.

2. The plaintiff, by his attachment, acquired only the rights of his debtor against the garnishees; and if his debtor could have recovered, he can; but it is clear his debtor could not, and he cannot.

3. The term compensation, relates to the character of the claim set up by a defendant. It is a plea which he alone may plead in the first instance, and is a matter to be opposed to a claim brought against him. *Code of Practice, article 363, 366, 368, 369. 5 Martin, N. S., 126. 7 Ibid. 517.*

4. The defendant is not required to exhibit his plea until the plaintiff has established his claim. The claim of the latter, whether he be the original creditor or his transferee, when liquidated, is that moment extinguished by the liquidated claim of the defendant.

5. The authority relied on by the court, is precisely in point to support the principle invoked for the garnishees. It speaks of the claim *opposed* in compensation, not the claim against which it is opposed *7 Toullier*, 369, 370.

6. In the present case, both claims were liquidated; the defendants or garnishees by notes, and the plaintiffs by an account of sales rendered. This account of sales must have been rendered to Cole & Co., the defendants, and approved by them; it was, at least, susceptible of being proved, and then it was far more liquidated than many accounts and claims which this court has admitted in compensation. *7 Toullier*, 445. *6 Martin, N. S.*, 612. *1 Louisiana Reports*, 303. *4 Ibid.*, 319.

7. But it is argued that the garnishees cannot set up a claim due to *them* as universal legatees, in compensation of a debt due by *them*, individually. Why not? Is not a debt due to them as universal legatees, a debt due to them individually?

*Hennen*, for the plaintiff, in reply.

1. Compensation can only take place by operation of law, when both debts are equally liquidated and demandable. *Louisiana Code*, 2205.

2. But here, the debt attempted to be set up in compensation by the garnishees, is not a debt due to their commercial firm, but a sum due them individually, as legatees; whilst the sum attached by the plaintiffs, is due by the garnishees, as a commercial firm, to the defendants. Compensation does not take place in such cases. *7 Toullier*, 453, No. 378. *8 Martin, N. S.*, 164. *2 Louisiana Reports*, 84, 326.

*Mathews, J.*, delivered the opinion of the court.

This case is before the court on a re-hearing. In our former judgment, we affirmed that of the court below, which

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## CASES IN THE SUPREME COURT

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A debt due to persons individually as legatees, cannot be offered in compensation of a demand due by them, in their social capacity as a commercial firm. The debt offered in compensation, appears to be due to them, as legatees of a deceased relation, which they could only claim individually. In our judgment heretofore pronounced, we assumed as a principle, that compensation did not take place by mere operation of law, between the mutual claims of the defendants and the garnishees, those of the former being unliquidated; and that the latter could not, in consequence of their situation, in the present case, plead it as an exception to the right of the plaintiffs, to recover.

Compensation does not take place by operation of law, between mutual claims, when one of them is unliquidated.

Garnishees cannot plead a demand against the defendant, in compensation, by way of exception, to the right of the plaintiffs to recover.

1 M.R. 25.  
2 M.R. 376.  
3 J.R. 337.  
4 A.M. 547.

It is, therefore, ordered, adjudged and decreed, that our former judgment remain undisturbed.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Garnishees cannot plead a demand in compensation by way of exception. It can only take place by operation of law.

The facts of this case are the same as those of *Blanchard vs. Cole et al.* See *ante* 153.

*Carter*, for the plaintiffs.

1. The garnishees are liable to the plaintiff's claim, because they failed to file their answer within ten days after they were summoned. *Code of Practice*, 252.

2. The answers of the garnishees, even if admitted as in time, are insufficient. They are not direct and positive, and do not state facts; they answer by a general statement.

3. They had no right to amend and file a supplemental answer. This fact admits their first answer was insufficient.

4. Even admitting all the answers to be in time and sufficient, the garnishees are liable. They show that the claim they plead in compensation, is due them by the defendants, as legatees of their brother; while they are indebted to the defendants, as a commercial firm.

4. The garnishees from their own showing have become liable to pay the judgment obtained by the plaintiff against the defendant, and the judgment of the District Court must therefore be affirmed. 5 *Louisiana Reports*, 82.

*Preston*, for the garnishees and appellants.

*Mathews, J.*, delivered the opinion of the court.

This case depends for its decision, on the principles adopted in the case of *Blanchard vs. the same parties*, and must therefore receive a similar judgment to that just rendered in the latter case.

Garnishees cannot plead a demand in compensation by way of exception. It can only take place by operation of law.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the District Court be affirmed, with costs.

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HART  
vs.  
LODWICK.

**HART vs. LODWICK.**

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

A judgment in admiralty, obtained by privilege creditors against a steam-boat, in which three-fourths of the owners are parties, is not conclusive against the interest of the other fourth owner, which is attached in the state court, at the suit of a creditor of such owner. The claimants must make other proof of their claims before they can proceed against it.

Where the plaintiff's demand exceeds three hundred dollars, his appeal lies against all the appellees who had judgment in their favor, even those whose demands are under three hundred dollars.

This is an action to recover the sum of two thousand four hundred and twenty-five dollars, with interest at six per cent. per annum, according to the laws of Pennsylvania, the balance due on three promissory notes, for one thousand dollars each, drawn by Kennedy Lodwick, the defendant, and one Haggarty. The plaintiff resides in Pittsburgh, and the defendant in Cincinnati. The notes were payable at the United States Bank, in Pittsburgh, and protested for non-payment. Lodwick being one-fourth owner of the steam-boat Carroll, on her arrival at New-Orleans, his interest therein was attached at the suit of the plaintiff.

The evidence shows that this boat was libelled in the District Court of the United States, by privileged creditors, and sold. Hart consented to the sale, on condition that one-fourth of the proceeds should be paid over to the sheriff, and held subject to his attachment suit. The three-fourths of the proceeds being insufficient to pay the privileged creditors under the libel, a rule was taken on Hart, by Martin, Coffin & Co., one of said creditors, claiming a balance of two hundred and eighty-two dollars, and by R. C. Stockton, for four hundred dollars, to show cause why the deficiency should not be paid out of the remaining

fourth which had been attached. The rule was taken under *Code of Practice, article 395, et seq.*

It was resisted on the ground that Hart was no party to the libel suit, and is not bound by the judgment rendered thereon, which can only operate on three-fourths of the boat, the other fourth being attached in this suit.

The district judge decided that the judgment of the District Court of the United States, although provoked against three-fourths of the owners, was *in rem.*; and, consequently, against the entire boat. Judgment was rendered in favor of the intervenors, for the amount of their privileged claims, respectively, from which the plaintiff appealed.

*J. Seghers & Schmidt, for plaintiff.*

1. The judgment in the admiralty court was *res inter alios acta*, as regards the plaintiff. His consent to the sale was given with the express reservation, that his consent should not, in any manner, prejudice his rights in the state court.

2. The sheriff attached before the marshal seized, and it is the right of the tribunal to maintain its jurisdiction, which first obtains possession of the thing. 1 *Paine*, 620.

3. But, by the agreement of the parties, things are in the same situation as if the sheriff had sold the whole, and paid three-fourths of the proceeds of the boat into the marshal's hands.

4. On a motion to show cause, the intervening party in the rule must come prepared to prove his claim, as on the part of the defendant, therein every thing is impliedly denied.

5. The intervening parties cannot claim a mortgage, as none attaches to this description of property.

*Roselius & Stockton, for the intervenors and appellees.*

1. The privilege of the claimants attached to the whole of the boat, so that an ordinary creditor cannot obtain priority by attachment, or other similar proceeding, to their injury.

2. The appeal, as to Martin, Coffin & Co., must be dismissed; the sum claimed by them being under three

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EASTERN DIST. hundred dollars. The fact of coupling this firm with  
*April, 1835.* Stockton, in the same rule, cannot better the case.

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3. It is no objection to the validity or force of the judgment in admiralty, that Hart, the plaintiff, was no party. Hart can only claim in right of Lodwick. He had notice of the admiralty proceedings, as appears by his agreement with the libellants, to sell the boat and divide the proceeds. It is also a general rule that a decree in admiralty is binding on the whole world.

*Martin, J.*, delivered the opinion of the court.

The plaintiff, in this case, having a claim of two thousand four hundred and twenty-five dollars against the defendant, attached his interest in the steam-boat Carroll, of which he was one-fourth owner. This proceeding opposed an obstacle to the execution of admiralty process sued out of the District Court of the United States, against the steam-boat in question, at the instance of several claimants for wages, work done, &c. The plaintiff consented that the obstacle should be removed by a sale of the boat, on condition that one-fourth of the proceeds should be retained by the sheriff, and represent his claim in the present suit, against the defendant's interest therein, and that the marshal should hold the surplus, subject to the suit of the claimants. This was accordingly done.

The claimants afterwards proceeded to judgment, on their respective claims, in the court of admiralty. The portion of the proceeds of the sale of the boat, received by the marshal, proved insufficient to satisfy all these claims. Martin, Coffin & Co. and R. C. Stockton, intervened in this suit, and obtained a rule to show cause why they should not be paid the balance of their claims remaining unsatisfied, out of the proceeds of the sale of the boat, reserved for that purpose in the hands of the sheriff; this balance to be paid out of the one-fourth part of the boat attached as the defendant's property. The intervenors contended that, as the whole of the boat was seized, subject to the privilege resulting from their claim, they were entitled to exercise this privilege on the

money in the sheriff's hands. From the decision of the District Court, which made the rule absolute, the plaintiff has appealed to this court.

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The plaintiff, in this suit, opposes the rule on the ground that, as the judgment of the court of admiralty is against the boat only *in rem*, and not against her owners or any of them *in personas* or *in personam*, it is, as to the latter, and consequently as to the present plaintiff or his debtor the defendant, whose interest in the boat was attached, *res inter alios acta* and without effect. This judgment, he contends, affords no evidence of the fairness or the amount of the claims of the intervening parties, against the money in the hands of the sheriff or the plaintiff. The district judge considered the judgment which Martin, Coffin & Co. and Stockton, had obtained in the court of admiralty, as a judgment against the owners of three-fourths of the boat, *in rem* and *in personas*, and consequently *in personam*, against the owner of the other fourth.

A judgment in admiralty, obtained by privilege creditors against a steam-boat, in which three-fourths of the owners are parties, is not conclusive against the interest of the other fourth owner, which is attached in the state court, at the suit of a creditor of such owner. The claimants must make other proof of their claims, before they can proceed against it.

In this respect, we are of opinion the judge of the District Court erred.

The whole case has been considered, notwithstanding the prayer of one of the intervening parties and appellees to have the appeal dismissed as to him, on the ground the sum demanded by him is less than three hundred dollars; and that his was a distinct demand from that of the other intervening party, and therefore the matter in dispute between him and the plaintiff is for a sum which is insufficient to give jurisdiction, and precludes the interference of this court.

Where the plaintiff's demand exceeds three hundred dollars, his appeal lies against all the appellees who had judgment in their favor, even those whose demands are under three hundred dollars.

We are of opinion, that the amount claimed by the plaintiff at the institution of the suit, imparts to it, its character in relation to its susceptibility of being the object of an appeal; that is, so far as regards the plaintiff, all the incidents in the suit are subject to an appeal. If it were otherwise, he might be deprived of his right of appeal in a case in which the constitution entitled him to one, by the matter in dispute being frittered down into small parcels, by the acts of the defendants or opponents in the suit.

## CASES IN THE SUPREME COURT

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BERTOT ET AL.

vs.

TANNER.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and the rule enlarged and continued with directions to the court *a qua* to proceed thereon according to law, and to require from the intervening parties respectively, other proof of their claims than the judgments in their favor and against the boat in admiralty; the appellees paying the costs of the appeal.

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BERTOT ET AL. vs. TANNER.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE  
THEREOF PRESIDING.

The jury are the proper judges in cases turning on questions of fact, and particularly in reference to the value of property, when fraud and lesion are at issue. When there is nothing in the record to authorise it, the verdict in such case will not be disturbed.

This is an action to rescind the sale of a tract of land on account of fraud and lesion on the part of the purchaser.

The plaintiffs allege they are the heirs and legal representatives of Charles Bertot, deceased, who was the owner of a tract of valuable land lying in the Parish of Terrebonne; that the defendant on the 4th of April, 1828, by fraud and contrivance induced their said ancestor to sell to him the said land for three hundred dollars, greatly below its value, and more than one-half less than its real value, by which the seller was aggrieved on account of the said fraud and lesion.

They pray that the sale be concealed and annulled, and such decree made therein as may be just and legal.

The defendant pleaded the general issue.

This cause, on the evidence relating to the value of the land, and the facts and circumstances attending the sale, was

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submitted to a jury who found a verdict for the defendant. Judgment being rendered theron, the plaintiff appealed. See *3 Louisiana Reports*, 252.

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On the return of the case to the District Court, the cause was again tried and a verdict for the defendant. From the judgment rendered in the case, the plaintiff again appealed.

*Nicholls*, for the plaintiffs.

*Porter, contra.*

*Bullard, J.*, delivered the opinion of the court.

The plaintiffs claim the rescission of the sale of a tract of land by their ancestor to the defendant on the ground of fraud, and of lesion beyond one-half its just value. The defendant answered by a general denial, and two successive juries have rendered verdicts in his favor. The first verdict was set aside and a new trial granted by judgment of this court, on the ground that certain evidence was rejected which ought to have been admitted. *3 Louisiana Reports*, 252. On the second trial the jury again found for the defendant and the plaintiffs appealed.

The record contains no bill of exception, nor does the appellant complain of the charge given to the jury. He has not furnished us with any points upon which he relies for a reversal of the judgment rendered in the District Court. The case turns altogether on questions of fact and particularly in reference to the just value of the property conveyed to the defendant. A jury of the parish in which the land is situated, with a better means of judging both of the value of the property and the credibility of the witnesses, than we can possibly obtain, has pronounced in favor of the defendant, and we see nothing in the record which would authorise us to disturb the verdict.

The jury are the proper judges in cases turning on questions of fact, and particularly in reference to the value of property, when fraud and lesion are at issue. When there is nothing in the record to authorise it, the verdict in such case will not be disturbed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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April, 1835.

PORTER ET AL.

VS.

BOYLE ET AL.

PORTER ET AL vs. BOYLE ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

770 N 583  
Where the certificate of the notary states that notice was given to the endorser, by depositing it in the post-office, in this city, addressed to him there: *Held*, that the certificate *per se* is clearly insufficient to prove notice, whatever may have been the domicil of the endorser, as no diligence is shown to find his domicil or give him personal notice.

Where the endorser resides in a faubourg of New-Orleans, notice of protest addressed to him and deposited in the city post-office is insufficient, without showing reasonable diligence to give him personal notice.

This is an action on a negotiable note for one thousand, three hundred and eighty-three dollars, twenty-four cents, drawn by Daniel Boyle and endorsed by Wm. Doherty and Solon Hill, secured by mortgage on a lot of ground in faubourg Lafayette.

The plaintiffs Porter, Tileston & Co., are the holders, and had the note protested for non-payment, and instituted suit against the drawer and endorsers. The notary certifies he notified the endorsers, by letters addressed to them, on the day of protest, "by depositing the letter for Doherty in the post-office, in the city of New-Orleans, addressed to him there, and by delivering the one for Hill to him."

The evidence showed that Doherty, the principal endorser, lived in the faubourg Livaudais, and within the limits of the parish of Jefferson.

The act of 1827, relative to protests of bills and notes, provides, "that when the endorser shall not reside in the town or city where the protest shall be made, notice may be given through the post office."

The district judge decided that the notice to the endorser was insufficient and not legal. Judgment being entered in his favor, as in case of non-suit, the plaintiff appealed.

*Hoffman*, for the appellant. No counsel appearing for the appellee.

*Bullard J.*, delivered the opinion of the court.

The sole question presented for our solution in this case, is, whether the record furnishes sufficient legal evidence of due notice of the protest of a promissory note, to the endorser. It is shown, that the endorser resided at the time of the protest, in the faubourg Livaudais.

The notary who made the protest, certifies that notice was given, by letter, served in the following manner: "by depositing the letter for said Doherty, in the post-office in this city, addressed to him," &c.

This certificate, *per se*, is clearly insufficient to prove due notice, whatever may have been the domicil of the endorser. It is not certified that diligence was used to find his domicil, nor any effort made to give him personal notice.

The witness, Hull, who acted as the clerk of the notary, testifies, that he inquired of the other endorser and was informed that Doherty resided in the faubourg. Instead of going to his residence, in order to serve him with personal notice, he put a notice in the post-office, addressed to him in New-Orleans. This Court has already decided, that the statute of 1827, on which the appellant relies, has not introduced any new rule on the subject of notices of protest, but merely a new mode of proof of notice. *7 Louisiana Reports*, 73.

Holders of promissory notes, are bound to give notice to endorsers, within a reasonable time after their dishonor, and if they trust to notaries, or to the clerks of notaries to perform that service, they do it at their own peril. It is not pretended that the plaintiffs were ignorant of the residence of their endorser, and that they could not by reasonable diligence have given him personal notice. There is nothing upon which they can base a right to bind him, by a constructive notice through the post-office, more especially as it is shown that their agent, Hull, was informed where he resided.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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April, 1833.

FORTER ET AL.

VS.

BOYLE ET AL.

Where the certificate of the notary states, "that notice was given to the endorsers, by depositing it in the post-office, in this city, addressed to him there": Held, that the certificate *per se*, is clearly insufficient to prove notice whatever may have been the domicil of the endorser, as no diligence is shown to find his domicil or give him personal notice.

Where the endorser resides in a faubourg of New Orleans, notice of protest addressed to him, and deposited in the city post-office, is insufficient, without showing reasonable diligence to give him personal notice.

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April, 1835.

SHULTZ  
vs.  
HIS CREDITORS.

**SHULTZ vs. HIS CREDITORS.**

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF  
NEW-ORLEANS.

A debtor who is arrested and gives bail, is not considered in *actual custody*, so as to entitle him to the benefit of the act of 1808, for the relief of insolvent debtors, in actual custody.

The plaintiff filed his petition and schedule and alleged he had been arrested and held to bail by some of his creditors, and others were disposed to oppress him ; he prayed to be allowed the benefit of the laws, relative to insolvent debtors in actual custody ; that a meeting of his creditors in open court, be called to deliberate on his affairs, and that he obtain a discharge on making a surrender of his property.

A meeting of creditors was ordered accordingly, to take place in open court, on the 27th August, 1834.

On the 9th December, 1834, one of the creditors took a rule on the debtor, to show cause, why the surrender and order staying proceedings against him should not be quashed and set aside, on the following grounds :

1. That said proceedings are irregular on their face.
2. The insolvent debtor was not in prison or actual custody, at the time said order was made.
3. That he absconded without complying with said order.

The parish judge on hearing arguments of counsel was of opinion, that the debtor having been arrested at the suit of a creditor and given bail, with bond conditioned that he shall not depart from the state, without leave of the court, cannot be considered in actual custody, &c. Judgment was rendered, avoiding and annulling the proceedings as irregular and informal. The insolvent debtor appealed..

*McMillen*, for the plaintiff, contended, that when a debtor was arrested and held to bail, he was entitled to the benefit

of the act, relative to insolvent debtors in *actual custody*. If he is not entitled to it, he is without relief. He cannot claim the benefit of the act, relating to the voluntary surrender of property. *2 Martin, N. S.*, 150.

2. The opposition of the creditors in this case, was informally and illegally made; an action of nullity, should have been commenced.

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*Conrad, contra.*

The moment Shultz was discharged from arrest on giving bail, he ceased to be in *actual custody*; and any surrender of his property, should have been in the form of a voluntary one. See *Law of 1808, sections 1, 2 and 4.* *1 Moreau's Digest*, 567.

2. This court decided very lately, *Hudson vs. Perry et al., ante*, 121, that a debtor released on giving bail was no longer in the custody of the sheriff.

*Bullard, J.*, delivered the opinion of the court.

The appellant having been arrested at the suit of Hesford & Sorgenfrey, gave bail to the sheriff, and thereupon applied by petition to the parish court, for the benefit of the act of 1808, entitled "an act for the relief of insolvent debtors in actual custody," &c. The judge granted an order for the meeting of the creditors in open court, and directed further proceedings to be stayed. The creditors, at whose suit the appellant had been arrested, then took a rule on him, to show cause, why the surrender made by him, and the order staying proceedings, should not be quashed and set aside, on the following, among other grounds :

1. That said proceedings are irregular on their face.
2. That the said Shultz was not in prison or actual custody at the time said order was given.

The order was rescinded and all the proceedings set aside by the court, and the debtor appealed.

The act of 1808, under which the proceedings in this case were commenced, was made for the benefit, only of debtors

## CASES IN THE SUPREME COURT

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A debtor who is arrested and gives bail, is not considered in *actual custody*, so as to entitle him to the benefit of the act of 1808, for the relief of insolvent debtors in actual custody.

in actual custody. The only inquiry therefore, is whether the debtor was in actual custody, at the time the application was made. We are of opinion that he was not. In the case of *Brainard vs. Francis*. 2 *Martin, N. S.*, 150., relied on by the appellant, the debtor had been arrested on a *ca. sa.* and had given bond for the prison bounds. He was considered still in actual custody, although the bounds of his prison had been enlarged. But in the present case the debtor taken by virtue of an order of arrest, had been released by the sheriff on giving bond with security not to depart from the state without leave of the court. After his release he could not be said to be in *actual custody*, in any sense of the word. His security could not arrest him, without obtaining an order from the court, and even if he had departed from the state, the surety might discharge himself by surrendering him in execution. See case of *Hudson vs. Perry et al.*, ante, 121.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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**LOUISIANA INSURANCE COMPANY VS. GORDON ET AL.**

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

Where a stockholder sells his stock subscribed in his name, to another, and the institution does no act releasing him from his obligation, he will be bound to pay up the instalments as called for by the directors.

The plaintiffs allege, that Martin Gordon lately was, or is now, owner of twenty-eight shares of stock, of one thousand dollars each, in their company, of which one-tenth was paid in at the time of subscribing. Since then, two instalments, of one-tenth each of the capital stock of said company has

been called for by the directors. That the defendant refuses to pay said instalments, alleging that he has sold said stock to E. E. Parker, who in like manner declines paying. They pray that Gordon & Parker be condemned to pay said instalments, amounting to five thousand six hundred dollars, with interest and costs.

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Gordon pleaded a general denial; and that long before said instalments were called for he had sold his stock in said company at auction, and with the knowledge and consent of the plaintiffs transferred it to E. E. Parker, the purchaser, whereby he ceased to be any longer a stockholder. He avers that consequently he is entitled to have the mortgage, which he gave as his security for this stock, cancelled and erased.

Parker pleaded a general denial.

The evidence showed that "at a meeting of the board of directors of the Louisiana Insurance Office, on the 13th of October, 1834, it was resolved, that an instalment of ten per cent. on the capital stock be called in; one-half on the 1st and the other half on the 15th November following; and that an additional instalment of ten per cent. be called at such times as the directors may determine." This resolution was notified to all the stockholders, of whom Mr. Gordon was then one for twenty-eight shares. On the 21st of October, Mr. Gordon sold his stock at public auction; sixteen shares at six dollars, and twelve shares at two dollars per share, when E. E. Parker became the purchaser. These shares were secured by mortgage. On the 22d October, the stock in question was transferred to E. E. Parker, the purchaser, on the books of the company by the attorney, in fact, of Martin Gordon.

On the 3d of December following, the other instalment was called for, in pursuance of the resolution of the 13th October preceding.

This suit was instituted in December, 1834.

The cause, on these pleadings and evidence, was submitted to the court. The district judge rendered judgment in favor of the plaintiffs against Gordon, reserving to him, his rights against Parker. Gordon appealed.

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*Strawbridge*, for the plaintiffs.

*Lockett*, for the appellant Gordon, contended that as Gordon sold out his stock before the instalments were payable, the plaintiffs should look to his vendee for payment.

2. After the sale and purchase, Gordon went to the office, and with the knowledge of the plaintiffs, transferred his stock on their books, to which they made no opposition or objection.

3. The judgment appealed from, is at all events erroneous, in not condemning Parker to pay the amount sued for, and not Gordon.

4. If Gordon be liable, judgment should have been rendered against Parker, in Gordon's favor, so that he may have the money refunded.

5. But it is contended that the judgment against Gordon is erroneous, and should be reversed; and that he have his mortgage erased and cancelled.

*Preston*, for Parker, argued to show that the latter was in no way liable as he never accepted the sale or transfer of the stock, as he ascertained the company had sunk its entire capital stock paid in. This fact he was not apprised of at the auction.

2. Gordon has not called Parker in warranty, as he might have done; who is consequently bound to set up the defence which he has, against his vendor.

Where a stockholder sells his stock, subscribed in his name, to another, and the institution does no act releasing him from his obligations, he will be bound to pay up the instalments as called for by the directors.

*Mathews, J.*, delivered the opinion of the court.

This suit is brought to compel the defendants to pay a certain per centage on the amount of stock subscribed by Gordon, to the institution, which was ordered by the board of directors of the company. He resists the payment by alleging that he is not bound to fulfil the obligations arising from his contract of subscription, &c., in consequence of having previously sold and transferred his stock to the defendant, Parker.

The court below, considering that the plaintiffs had done no act, by which Gordon was released from his obligation,

condemned him to pay the amount claimed, reserving to him his right to pursue his vendee to recover from him. From this judgment, Gordon appealed.

The decision of the case depends mainly on the pleadings and matters of fact, and we are of opinion that the court below did not err in its conclusions, on these matters.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.  
April, 1835.

JACOBS ET AL.  
vs.  
LEWIS'S HEIRS.

**JACOBS ET AL. vs. LEWIS'S HEIRS.**

**APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF  
NEW-ORLEANS.**

The general rule is, that the lands and slaves belonging to minors, cannot be sold for less than their appraised value. But the case of a licitation, provoked by a co-heir, or co-proprietor, to effect a partition, is an exception, and puts minors on a legal footing with persons of full age.

The prohibition against alienating minor's property, for *less* than its appraised value, does not extend to a case of a judgment against him, or of a licitation made at the instance of a co-heir, or other co-proprietor.

This is an action of partition. The plaintiffs claim to be the transferees, by public acts, of all the shares or portions of six of the heirs at law of the late Robert Lewis, who died in the city of New-Orleans, in 1832, leaving a large property or estate. The petition sets out the names of the several heirs, comprising the mother as the only ascendant living, who is entitled to one-fourth; and brothers and sisters, or their legal representatives, entitled to the remaining three-fourths, to be equally divided among them. It is further alleged, that some of the co-heirs, who are made defendants, are minors, and that the defendants reside out of the state

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The petitioners pray to be recognised as assignees of the heirs named in the said act of transfer; that a partition of the common property of said estate be made, in such manner as may be deemed legal; and that a *curator ad hoc* be appointed to represent the absent heirs.

The attorney appointed to represent the absent heirs, admitted the facts stated in the petition, and submitted the case to the decision of the court, whether the prayer of the petitioners should be granted.

The court recognised the petitioners to be assignees, and confirmed them in the portions or shares of said heirs, severally transferred to them, and ordered a partition to be made accordingly.

The register of wills offered the entire property for sale, to effect a partition, by licitation; which, failing to bring its appraised value, no adjudication was made.

The counsel for the plaintiffs, took a rule on the attorney of the defendants, to show cause why the property should not be sold on the terms prescribed by the deliberations of the family meeting, heretofore homologated by the court, *at whatever price it may bring*. This rule was made absolute. The attorney for the absent heirs appealed from the order making the rule absolute.

*L. C. Duncan*, for the plaintiffs and appellees, relied on the *Louisiana Code, articles 1201 to 1208*, in support of the judgment of the Court of Probates.

*J. Slidell, contra.*

*Martin, J.*, delivered the opinion of the court.

The plaintiffs in this case, claim to be transferees of the portions or shares of several of the heirs of the late Robert Lewis, deceased, and demand an admission of their claims, and seek a partition of said estate, between them and the co-heirs of their transferors. The defendants and co-heirs being absentee, an attorney was appointed by the court, to defend their interests. He did not deny the allegations in

the petition, but submitted the case to the decision of the court. The partition was found extremely difficult and inconvenient to be effected, in any other manner than by a litation. This was attempted. The estate was put up at auction, but the appraised value was not bid, and there being several minors among the defendants, the register of wills declined adjudicating the property, and there was no sale. The Court of Probates finally directed the property to be sold for whatever price it would bring. From this decision, the defendants appealed. The correctness of the opinion of the court on this point, is the only question submitted for our solution and decision.

On this point, there seems to be little difficulty. It is true, the Louisiana Code, article 337, expressly declares that the lands or slaves, belonging to minors, shall not be sold for a less sum than its appraised value. But the case of a litation or sale, at the instance of a co-heir or other co-proprietor, in order to provoke a partition, is expressly excluded by article 339 of the Code, from the prohibition contained in article 337.

This principle was recognised by this court at its last term, in the Opelousas district. It was there expressly laid down, that according to article 339 of the Code, the prohibition against alienating the immoveables and slaves of a minor, for a less sum than the appraised value mentioned in the inventory, does not extend to a case in which judgment is to be executed against him, or of a litation made at the instance of a co-heir or other co-proprietor. See *case of Towle's Administratrix vs. Weeks et al.* 7 La. Reports, 312.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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April, 1835.

JACOBS ET AL.  
vs.  
LEWIS'S HEIRS.

The general rule is, that the lands and slaves belonging to minors, cannot be sold for less than their appraised value. But the case of a litation provoked by a co-heir, or co-proprietor, to effect a partition, is an exception, and puts minors on a legal footing with persons of full age.

The prohibition against alienating minors' property for less than its appraised value, does not extend to a case of a judgment against him on a litation, made at the instance of a co-heir or other co-proprietor.

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M'PHILIN'S  
EXECUTORS  
vs.  
GILLISE.

**M'PHILIN'S EXECUTORS vs. GILLISE.**

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF  
NEW-ORLEANS.

When there is nothing in the record which would authorise the appellant to hope for any relief against a judgment rendered on his confession, it will be affirmed with ten per cent. damages and costs.

This is an action on a promissory note executed by the defendant payable to Patrick M'Philin, for five hundred dollars. The plaintiffs sue in their capacity of executors of Patrick M'Philin, deceased, and allege they have amicably demanded the same, and payment has been refused. They pray judgment.

The defendant admits his signature to the note, which he avers was given on a settlement of accounts, between him and the deceased, and that since he gave the note, M'Philin became indebted to him in the sum of eight hundred and eighteen dollars which he pleads in compensation and reconvention.

The account for the reconventional demand is made out against the executors of the deceased, and annexed to the answer.

On the trial the defendant obtained leave to withdraw his reconventional demand, and submitted the case on his acknowledgment that he signed the note. From judgment rendered against him, he appealed.

*Macready*, for the plaintiffs.

*Preston*, contra.

*Bullard, J.*, delivered the opinion of the court.

The present suit was brought on a promissory note duly protested for non-payment. The defendant admitted his signature but denied any amicable demand and alleged that

the note was given on settlement of accounts, but that the plaintiff's testator was indebted to him in a larger amount, which he pleaded in compensation. Before the trial he was permitted to withdraw his plea in compensation, and the case was tried on his admission that he signed the note. Judgment was rendered in favor of the plaintiff, but without costs, and the defendant appealed.

We see nothing in the record which could authorise the appellant to hope for any relief in this court, against a judgment rendered on his own confession, and we feel bound to grant the prayer of the appellee and award him damages for a frivolous appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with ten per cent. damages, and that the appellee pay the costs of this appeal.

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April, 1835.

ORPHAN ASYLUM  
vs.  
MISS. MARINE  
INS. CO.

When there is nothing in the record which could authorise the appellant to hope for any relief against a judgment rendered on his confession, it will be affirmed, with ten percent. damages and costs.

#### ORPHAN ASYLUM vs. MISSISSIPPI MARINE INSURANCE CO.

##### APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a corporation, by a vote of its directors, appoints an attorney at law to manage its legal business for a year, with a stated annual salary, and he accepts the office, the contract is binding on both parties for the period of one year, when there is no provision authorising either party to retract at will.

So where an attorney at law was appointed the attorney of the insurance office of defendants, with an annual salary of five hundred dollars, and was dismissed by the board of directors at the end of two months and a half: *Held*, that he is entitled to recover his salary for the whole year.

This is an action to recover the sum of five hundred dollars from the defendants, being the amount of the annual

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EASTERN DIST. salary of the attorney of the defendant's insurance office,  
April, 1835. which has been duly assigned to the plaintiffs.

ORPHAN ASYLUM  
VS.  
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The evidence shows that on the 20th November, 1833, John Slidell, Esq. was appointed attorney of the Mississippi Marine and Fire Insurance Company, which was notified to him by the President, and accepted, in the following terms: "You have been appointed by the board, attorney for this office. You will please say in reply to this, whether you will accept the same. The salary is five hundred dollars per annum." To which Mr. Slidell replied, on the 20th, "I accept the appointment, and am prepared to receive any commands in relation to the institution, with which you may be pleased to honor me."

At a stated meeting of the board of directors held on the 6th February, 1834, H. Lockett, Esq., was appointed attorney of the institution, which was notified by the secretary to Mr. Slidell. To which he replied, that "having been appointed without solicitation on his part, and removed without cause, he should expect payment of the salary of an entire year; and should, at the proper time exact that payment, if it be refused, appropriating the amount to the benefit of the Male Orphan Asylum."

There was no resolution of the board or extract from the minutes of its proceedings relative to this election, in evidence. All that related to the appointment, tenure and salary of the office, was expressed in the letter of notification by the president.

C. Harrod, president of the company, witness for plaintiffs, says, that Mr. Slidell was elected in the place of Mr. N. Morse, deceased. That Mr. Morse was the attorney of the office, for several years, and from his first appointment until his death. Mr. Slidell was elected to fill the vacancy occasioned by the death of Mr. Morse; and that the new board at its meeting, elected Mr. Lockett, as it is customary with a new board, to elect new officers.

Mr. Story, late president, states, "that at the time of Mr. Slidell's appointment he was president of the defendant's institution: that his impression was, that Mr. Slidell was

elected by the year and that none of the directors supposed that he would be removed in three months. Witness was president of said company seven or eight years, and Mr. Morse and Mr. Slidell, were the only attorneys during that period. That Mr. Slidell during his appointment attended to several suits for the company; that no cause of complaint existed against him during that period.

The defendants denied that they were in manner indebted to the plaintiffs, except for a balance of one hundred and four dollars due to Mr. Slidell, which they were and had been at all times ready to pay.

The district judge, who tried the cause in the first instance, inferred, from the letter of acceptance and from what appears to be the usual practice, that the attorney was not elected for a specified period of time, but elected generally at a salary of five hundred dollars per annum. That the case of an overseer is governed by the article 2719 of the *Louisiana Code*, and he cannot be discharged without good cause. In regard to clerks, they come under article 2718, and the contract is commutative. The employer may dismiss his clerk, and the clerk leave his employer at pleasure. The case of an attorney or physician, although it appears an extension of the rule, should be governed by the same principle. Judgment was rendered for one hundred and four dollars and costs in favor of the plaintiffs, but rejecting the claim for the annual salary. The plaintiffs appealed.

*G. B. Duncan*, for the plaintiffs.

*Lockett, contra.*

*Mathews, J.*, delivered the opinion of the court.

The plaintiffs in this case, claim as assignees of John Slidell, five hundred dollars from the defendants on a contract made by the latter with the assignor, whereby they agreed to pay to him that sum for professional services to be rendered as attorney and counsellor at law, for the space of one year. The insurance company refused to accept these services

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INS. CO.

Where a corporation, by a vote of its directors, appoint an attorney at law, to manage its legal business with a stated annual salary, and he accepts the office, the contract is complete and binding on both parties, for the period of one year, when there is no provision authorising either party to retract at will.

The contract commenced by a vote of the board of directors appointing the person, under whom the appellants claim, their attorney with a salary of five hundred dollars per year. This order was noticed to him by the president, and the office was accepted by the attorney. From the date of the acceptance the contract was complete and binding on both parties, for the period of one year after its ratification, unless the law under which it was made authorises either party to retract *ad libitum*, without assigning any just cause for the change of will. The district court after argument and discussion of several articles of the code, on the subject of letting and hiring, came to the conclusion that the attorney in the present instance, stands in the predicament of a hired servant, attached to the person or family of his employer.

This principle assumed, is the main basis of the judgment of that court. But we are unable to admit its correctness without relinquishing our understanding of language and opinions touching the relations of men in civil society, counsellors and attorneys are admitted to the profession of law, on the supposition of learning and integrity. To place them in the precise category of menial and domestic servants, appears to us would be incongruous and unauthorised by the law. Their utility in the service of others depends on mental acquirements; they are valuable on the score of their science.

If the employer of an artisan, or even a common laborer, when the contract is made for a specific sum to be paid for services to be rendered during a fixed period, cannot discharge the hireling unless for good cause, without being responsible for the payment of the price of the whole term of service, what sound reason can present itself to the mind of any person, why one who contracts to give the use of his mental exertions and services to another should not have a

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right to claim the entire benefit of a contract made for a determined period?

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Any license given to parties bound by contracts to dissolve the obligation arising from them at the will of either, forms an exception to the general rule of inviolability which should prevail in all agreements legally made between individuals. The attorney employed by the defendants in the present case, does not come within any exception to the general rule; he and those under him have therefore a right to claim its benefit. See *Louisiana Code, article 2718, 2719 and 2720.*

KEENE

vs.

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So, where an attorney at law was appointed the attorney of the insurance office of defendants, with an annual salary of five hundred dollars, and was dismissed by the board of directors, at the end of two and a half months: Held, that he is entitled to recover his salary for the whole year.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, annulled and reversed; and it is further ordered, adjudged and decreed, that judgment be here entered in favor of the plaintiffs and appellants, against the defendants and appellees, for the sum of five hundred dollars, with interest at the rate of five per cent. per annum, from the judicial demand, and costs in both courts.

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### KEENE vs. M'DONOUGH.

#### APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A judgment of the United States District Court, affirmed by the Supreme Court, which concludes in these words: "judgment must be given for the defendant, and the plaintiff's petition must be dismissed," will be considered as final, in favor of the defendant, and as *res judicata* in another action for the same demand.

Where a final judgment of the Supreme Court of the United States is pleaded as *res judicata*, its correctness will not be inquired into by this court.

This is a petitory action in which the plaintiff seeks to recover a tract of land situated near the town of Baton Rouge, which he alleges he purchased at a public sale, in

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EASTERN DIST. 1803, made by Governor Grandpré, and which is now in the possession and claimed by the defendant.

**KEENE  
vs.  
M'DONOUGH.**

A suit was instituted by the present plaintiff against the same defendant for the land in question, in the United States' District Court for the Eastern District of Louisiana, in April, 1832, and judgment rendered thereon, concluding as follows: "The decree of the Spanish governor being in favor of the defendant's title, and made by a competent tribunal, within the limits of the state, judgment must be given for the defendant and the plaintiff's petition must be dismissed."

This case was taken by writ of error to the Supreme Court of the United States, in which the judgment of the court below was "*affirmed*." See 8 Peters, 308 and 311.

The defendant pleaded a peremptory exception to the petition, because all the things set up and alleged in it had been adjudged and finally determined in the suit in the Supreme Court of the United States, on a writ of error to the United States District Court for Louisiana.

This exception was sustained by the district judge; and from the judgment rendered thereon, the plaintiff appealed.

*Keene, in propriâ personâ, for appellant.*

1. The judgment of *dismissal* of this suit in the District Court of the United States for the Eastern District of Louisiana, was merely a judgment of non-suit, which cannot serve as the basis to support the plea of *res judicata*.

2. The judgment of the Spanish governor, Grandpré, rendered in this case in 1804, was a nullity, as the defendant was not cited or represented in the suit and never appeared in court: It cannot, therefore, be pleaded as *res judicata*, so that this case should be heard on its merits in this court.

3. A judgment which is in itself an absolute nullity, cannot be made the basis of the plea of *res judicata*.

*Grymes, contra.*

*Martin, J., delivered the opinion of the court.*

In this case the plaintiff has appealed from a judgment of the District Court, sustaining a peremptory exception or

plea to the right of action, predicated on a final judgment rendered in the Supreme Court of the United States, on a writ of error, to the District Court of the United States for the Eastern District of Louisiana; as forming the *res judicata* on the allegations in the petition. See 8 Peters, 308.

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It is not denied, that the present claim is not identically the same, as that which was presented to the Court of the United States; but it is urged that the judgment which was rendered in that court, is not a judgment on the merits, but simply one of *non-suit*.

The judgment of the United States District Court for the Eastern District of Louisiana, concludes in the following words: "The decree of the Spanish Governor being in favor of the defendant's title, and made by a competent tribunal within the limits of the state, *judgment must be given for the defendant*, and the plaintiff's petition must be dismissed."

The plaintiff has urged, that the judgment of the Spanish governor, which is the apparent basis of the judgment of the United States' District Court, is a mere *nonentity*, because it was rendered without any citation, appearance or presence of the party, against whom it was pronounced, and cannot be presumed to have caused a destruction of his title.

It is not for us to inquire into the correctness of the decision of the United States District Court, which appears, however, to have been confirmed by the Supreme Court of the United States. But this court cannot refrain from considering it as a final judgment on the merits, and not a judgment of non-suit, which would authorise the institution of another suit, on the same grounds and for the same cause of action.

Judgment of the United States District Court, affirmed by the Supreme Court, which concludes in these words: "Judgment must be given for the defendant, and the plaintiff's petition must be dismissed," will be considered as final, in favor of the defendant, and as *res judicata* in another action for the same demand.

Where a final judgment of the Supreme Court of the United States, is pleaded as *res judicata*, its correctness will not be inquired into by this court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs,

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ABAT VS. NARTIGUE ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Creditors for supplies of ship-chandlery, &c., furnished a vessel on her departure, loose their privilege on the vessel or her proceeds, for the amount of such supplies, if they suffer her to depart on a second voyage before enforcing their privileged claim.

Where there are several opposing claimants to the plaintiff, whose demands were severally and separately passed upon by the judgment of the inferior court, none of them can be heard on the appeal, but such as are actually appellants from the court *a qua*.

This is an action on a promissory note, payable to order, against the drawer and endorser, for one thousand one hundred dollars. The plaintiff obtained judgment, and on the 24th June, 1834, levied his execution on the schooner Emperor, belonging to the defendant Nartigue, which was sold by the sheriff, on the 19th August following, after complying with all the formalities of law, for the sum of two thousand, seven hundred dollars in cash, being two-thirds of her appraised value.

R. Layton & Co. obtained a provisional seizure on the 3d of July, while the vessel was in the hands of the sheriff, on which he claimed a privilege for the sum of five hundred and nineteen dollars seventy-three cents, being for supplies of ship-chandlery, from the 29th November, 1833, to the 10th February, 1834, when she sailed on a voyage to the West Indies, and for which a note was taken. The Orleans Insurance Company, also, made claim to three hundred and sixty-nine dollars fifty cents for premium of insurance, on the vessel valued at six thousand dollars, for six months, from the 6th February to the 6th August, 1834.

Several other claimants presented claims, and demanded to be paid by privilege or otherwise out of the proceeds of the vessel when she should be sold.

The district judge fixed a day for hearing the several claimants, and for classifying their claims according to law. EASTERN DIST.  
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The evidence showed that the vessel traded to the West Indies, from the port of New-Orleans. That she cleared on the 8th February, 1834, and sailed about the 11th of the same month for Jamaica and returned. On the 25th April, following, she sailed again for Port-au-Prince, and returned to New-Orleans, the 23d June, and was seized on the 26th of the same month in this suit. ABAT  
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The judge *a quo* decided that the plaintiff having obtained a judgment, and recorded it, and actually seized the vessel before any of the claimants had a privilege, which nothing but a superior privilege could interfere with ; that Layton & Co. had lost their privilege, by suffering the vessel to depart on a second voyage ; and that the insurance company only were entitled to a privilege for the premium on the last voyage, for which they were allowed half their claim, or one hundred and eighty-four dollars seventy-five cents.

From so much of the judgment as dismissed the claim of R. Layton & Co., they alone appealed.

Preston, for the appellants, contended, that the claim of Layton & Co. was a privileged one, which was not extinguished in regard to the schooner or its proceeds under seizure at the suit of the plaintiff. *Louisiana Code, article 3202, No. 8. Code of Practice, 289.*

2. This privilege is not prescribed against until the lapse of one year from the time the debt accrued. One year had not elapsed in this case.

3. No. 8, of the article of the Code giving this privilege, does not limit it to the last voyage. But the preceding numbers of this article do limit the privilege to the last voyage in express terms. Hence there is a distinction between them. The term voyage, in No. 8, is used twice, and merely as a word of description and not of limitation.

4. A privilege given by law cannot be limited by the court ; it exists until prescribed by law. "Privileges become extinct by prescription." *Louisiana Code, article 3244.*

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5. The debt or claim for supplies for the construction or equipment of ships, is prescribed by one year. *Louisiana Code, article 3499.*

6. Layton & Co. claim a privilege over Abat, the seizing, but who is *common* creditor. The vessel had only been seized four days before Layton & Co. also seized for their privileged claim. It is believed the *express words* of the law give them a *privilege* over the plaintiff, which is not extinguished, and cannot be until the extinction of the debt.

*D. Seghers, contra.*

*Martin, J.*, delivered the opinion of the court.

The plaintiff in this case, having obtained a judgment against the defendants, for the sum of one thousand one hundred dollars, interest and costs, issued his execution thereon, which was levied on the schooner Emperor, the property of Nartigue, and sold for the net sum of two thousand three hundred dollars. While the schooner was under seizure, several claimants put in their claims for supplies furnished, and other advances made and expenses incurred on account of said vessel, and urged their pretensions and right to be paid by privilege over the seizing judgment creditor, out of the proceeds of the sale. Among these was Robert Layton & Co. for five hundred and five dollars seventy-three cents, for ship-chandlery furnished up to the 8th February, 1834; and fourteen dollars twelve cents for articles delivered on the 10th of the same month. Judgment was rendered rejecting their claims, from which Layton & Co. appealed.

The appellants complain of the decision of the district judge in disallowing them a privilege on the vessel, which they claim under the provisions of the *Louisiana Code, article 3204, No. 8, and Code of Practice, article 289.* The appellee admits that the privilege claimed, once existed on the vessel, but contends that the article of *Louisiana Code, cited* in its support, confines the existence of this privilege, to the end of the first voyage made after the supplies are furnished. That

in this case, the schooner made several voyages after the supplies were furnished, before the exhibition of the claims of the appellants. He further contends that the *Code of Practice* regulates the manner in which privileged and other claims or rights, are to be enforced; but that the nature of those rights, and the period within which they exist and afterwards ceased to exist, are ascertained and governed by the *Louisiana Code*.

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The evidence in the cause shows, that the articles for which this privilege is claimed were delivered on or before the 8th or 10th of February, 1834, after which the vessel made two voyages to the West Indies, and back again to the port of New-Orleans, before she was seized. She returned from the second voyage on the 23d of June, and was seized by the sheriff under and by virtue of the execution of the plaintiff, on the 26th of the same month.

Layton & Co. had taken a note for the amount of their debts and made a provisional seizure of the vessel on the 3d of July, while she was in the hands of the sheriff, under the first seizure.

The article 3204, No. 8, recognises a privilege in sellers, those who have furnished materials or labor in the construction, if the vessel has never made a voyage; and creditors for supplies, &c., previous to the departure of the ship if she has already made a voyage.

The appellants must therefore show that they are entitled to the privilege claimed by them, under the second branch of this article, for it is clear they cannot come under the first.

The privilege is limited to the departure of the vessel on her first voyage, after the supplies are furnished in the one case, and by her departure on a second, after her return from the first voyage, in the other case.

In the first hypothesis, the privilege expired on the departure of the schooner for Jamaica, on the first voyage after the supplies were furnished; in the second, it expired on her departure for Port-au-Prince, because she had made a voyage since the supplies were furnished; hence the privilege must have been claimed before her departure for Port-au-Prince, on her second voyage since it attached, or it is lost.

Creditors for supplies of ship chandlery, &c., furnished a vessel on her departure, lose their privilege on the vessel or her proceeds, for the amount of such supplies, if they suffer her to depart on a second voyage before enforcing their privileged claim.

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In neither hypothesis, therefore, can Layton & Co., the appellants in this case, exercise their privilege on the vessel or its proceeds.

The counsel for the appellants has invoked the *Code of Practice*, article 389, where the person who has furnished materials for a vessel is authorised in certain cases, when he sues the owner or captain, to demand the seizure of the vessel, to enforce his privilege, on making affidavit of certain facts. This article does not appear to us, to have any bearing on the present case. No owner or captain is sued here, and the *Code of Practice* in defining the manner in which the privilege is to be exercised, does not extend the period, which is limited by the *Louisiana Code* for the duration of its existence.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, in regard to Layton & Co., be affirmed, with costs.

The New-Orleans Insurance Company, who were also claimants in the court below, and only had their claim partially allowed, have prayed to have the judgment corrected and their whole claim allowed in this court.

They contend that they are in some degree parties to the appeal, because if the appellants had been relieved in this court, whatever had been allowed them, would have proportionally diminished the amount which the company obtained in the first instance; hence the company being a party to the appeal without being appellant must be considered as an appellee, and as such may require an amendment of the judgment in their favor.

Where there are several opposing claimants to the plaintiff, whose demands were severally and separately passed upon by the judgment of the inferior court, none of them can be heard on the appeal but such as are actually appellants from the court *a qua*.

It appears to the court, that what is here asked by the insurance company cannot be accorded to them. The case shows that there are several claimants, whose demands were passed upon in the court below, besides the appellants and the insurance company. They would all be affected if the judgment be amended in favor of the company. It therefore follows, that the latter can only obtain relief contradictorily with these several claimants.

The appellants are without interest and cannot oppose the pretensions of the insurance company, should they be heard on this appeal. Their privilege has been denied here, and the plaintiff and appellee has been cited to answer the appeal of the appellants only.

The pretensions of the insurance company, therefore, to obtain relief on this appeal, cannot be heard.

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EASTERN DIST.  
April, 1835.

WINTER  
vs.  
THIBODEAUX'S  
EXECUTORS;  
ET AL

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#### WINTER vs. THIBODEAUX'S EXECUTORS ET AL.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE  
JUDGE THEREOF PRESIDING.

The treasurer's deed of conveyance to the purchaser of a tract of land sold for the state taxes, is insufficient evidence of title, without legal evidence of the original assessment of the taxes due.

Under the *Civil Code* of 1808, article 15, page 454, minors had a legal mortgage on the property of their tutor from the day of his appointment: *Held*, also, that land acquired during the tutorship is subject to the mortgage of the minor.

A judgment recovered by a minor against his tutor, when not attacked as fraudulent or collusive, is *prima facie* evidence of the amount due, the payment of which is secured by legal mortgage, when offered against a third possessor of the mortgaged premises.

This is an action by the plaintiff as the original vendor of a tract of land, sold to the ancestor of the defendants, in which he seeks to have a former judgment rendered *conditionally*, in his favor for the price, made absolute.

The pleadings and evidence of the case show, that on the 5th of December, 1828, Gabriel Winter obtained a judgment against the executors of the late H. S. Thibodeaux for seven thousand dollars, the price of a tract of land which he had sold in the life-time of the latter. But the defendants having

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shown they were in danger of eviction by the heirs of Walker Gilbert, the judgment was made conditional that Winter should not take out execution, until he gave security in the sum of fifteen thousand dollars.

In May, 1831, the plaintiff instituted the present suit to have the said condition set aside, and that the judgment be made unconditional and absolute. He claimed this alteration on the ground that the land in question, on which a mortgage is claimed by the heirs of Walker Gilbert, was in 1828, while W. Gilbert was still living, sold by the treasurer, for the state taxes due on it in 1813—14, and purchased by A. A. Suares, for thirteen dollars, who received the treasurer's deed therefor, and conveyed the land so purchased to the plaintiff for fifteen dollars sixty cents as the consideration. He contends that he took the premises under this sale for the taxes and the conveyance to him, free of all liens and mortgages subsequent to the year 1816, before the appointment of tutor. In September, 1833, the heirs of Walker Gilbert intervened and claimed the land in virtue of a legal mortgage, and judgment, for twenty-one thousand four hundred and fifty-five dollars, with interest, rendered in March, 1825, against Lloyd Gilbert, their late tutor. They claim the right of mortgage on all the property owned and possessed by their said tutor, from the date of his appointment in 1818, till his death, on the 7th March, 1825. The land in contest had been sold by him in the mean time, to the present plaintiff, who sold and conveyed it to the late H. S. Thibodeaux, the ancestor of defendants. They allege they have made an amicable demand, of more than ten days, from the defendants, to pay their judgment or surrender up the premises, which they have refused. The defendants plead the general issue, and aver they are purchasers and possessors in good faith, and entitled to the value of their improvements, amounting to fifteen hundred dollars; that Winter, their vendor, be called in warranty, and the same judgment rendered against him, in their favor, as the heirs of Gilbert may obtain against them. When all these separate demands were consolidated and submitted to the court for decision,

by consent of parties, all the questions of improvements and damages, as well as the rights of Gilbert's heirs to recover fruits and revenues, were reserved for future investigation.

The district judge, who tried the cause, decided that Winter being the owner of the land when he purchased from Suares, who bought at the sale for taxes, it was only redeeming his own land, the sale being a *vente à réméré*, and that he did not strengthen his title thereby. That the heirs of Walker Gilbert had a legal mortgage on the land in question, from the date of the appointment of their tutor, Lloyd Gilbert, from whom Winter purchased it.

Judgment was rendered against the land, in the hands of the defendants, as third possessors, in favor of Gilbert's heirs, for the amount of their judgment against their tutor, and in favor of the defendants, heirs of Thibodeaux, against Winter, in warranty, for such sum as the heirs of Gilbert should derive from a judicial sale of the mortgaged premises.

*Winter* appealed. Thibodeaux's heirs joined in the appeal, and prayed the judgment to be corrected, by allowing them the value of their improvements.

*Porter*, for the plaintiff, urged the following points:

1. The district judge erred in deciding that the treasurer's sale to Suares, evidenced by deed, did not convey to him all the property of Walker Gilbert, in the premises sold, free from all posterior liens and incumbrances. 2 *Martin's Digest*, 456.

2. The judgment of the District Court is also erroneous, because it recognises a legal mortgage in favor of the heirs of Walker Gilbert, on the property now owned and possessed by the heirs and legal representatives of H. S. Thibodeaux, deceased. *Civil Code*, p. 72. *Louisiana Code*, 354.

*Taylor*, for the heirs and representatives of Thibodeaux, contended there was error in the judgment below, because it only gave them the price of the land, without any allowance for improvements and such damages as they had sustained.

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2. The plaintiff was not entitled to any interest on the judgment he obtained in 1826, as it required him to give security before he was entitled to any benefits under it. *3 Martin, 245. 6 Ibid., 659. 8 Ibid., N. S., 214. 1 Louisiana Reports, 81. 4 Ibid., 94-5.*

3. The heirs of Thibodeaux should have had judgment against Winter, in warranty, for the value of their improvements. *Civil Code, 104, arts. 1, 2 and 3. Ibid., 196, art. 216. Ibid., 462, art. 98. Louisiana Code, 500, 1334, 3370.*

*J. Seghers*, for the heirs of Walker Gilbert, the intervenors.

1. The judgment of the minors, which they had obtained against their tutor, is *prima facie* evidence of the debt and mortgage against the third possessor of the mortgaged premises, unless it be attacked on the ground of fraud and collusion. *1 Louisiana Reports, 379.*

2. The legal mortgage of the minors could not be extinguished or affected by the pretended sale for the taxes, by the state treasurer. This would be opening the door for the greatest frauds.

3. In 1828, when this land was sold, the state had no longer any lien or privilege for taxes due in 1813 and 1814. By the adoption of the code in 1825, the state renounced her privilege. *Louisiana Code, art. 3152. 3 Louisiana Reports, 158.*

4. The minors of Gilbert object to the treasurer's sale, on the ground that there is no proof that the land sold, is the same owned by Walker Gilbert, and now in the possession of the defendants. *4 Louisiana Reports, 207.*

5. The state treasurer had no authority to sell lands for taxes due, so far back as 1813 and 1814. See acts of 1818, *2 Moreau's Digest, 479.*

6. Even if the state treasurer had authority to sell lands for taxes due in 1813 and 1814, there is no evidence that he complied with the formalities of law; that the land was advertised, &c. In forced alienations, the legal formalities required by law, must be strictly complied with. *4 Louisiana Reports, 150, 207.*

7. There is no assessment roll produced, or evidence that this land was assessed for the state taxes. This is a fatal defect. 6 *Martin N. S.*, 347. 7 *Louisiana Reports*, 46.

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*Bullard, J.*, delivered the opinion of the court.

The appellant, Winter, having sold to the late H. S. Thibodeaux, a tract of land which formerly belonged to Walker Gilbert, sued the executors of his vendee for the price, and recovered judgment; subject to the condition, that its effect should be suspended until Winter should give security in the sum of fifteen thousand dollars, to protect the defendants against the danger of eviction, in consequence of legal mortgage on the land, in favor of the minor heirs of Walker Gilbert, resulting from the tutorship of Lloyd Gilbert, to whom the land belonged at the time he was appointed their tutor.

The present suit was instituted by Winter, to cause that restriction as to the effect of his first judgment, to be judicially rescinded, on the allegation, that the land had been sold for taxes due by Walker Gilbert in 1813 and 1814, that he had purchased the land from Suares, who bought it at the treasurer's sale, and that he holds it free from all liens and mortgages subsequent to the year 1814, and that the legal mortgage set up by the minors Gilbert, never attached.

In this suit the heirs of Walker Gilbert intervened and set up their mortgage, averring, that the land belonged to Lloyd Gilbert their tutor at the time of his appointment, and that they have a judgment against him for a large balance on account of his tutorship. They further represent, that they have instituted an hypothecary action against the representatives of Thibodeaux, which is yet pending, and which they pray may be consolidated with this suit. The representatives of Thibodeaux, deny generally the allegations in the petition, they allege that the first judgment rendered against them in favor of Winter, not having been appealed from, has become final, and that they are not bound to pay any part of the money until security be given according to that judgment.

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In the hypothecary action, Winter was called in warranty, and the two cases having been consolidated, were tried together, judgment was rendered in favor of the heirs of Gilbert, and the original plaintiff appealed.

The case presents two questions for the consideration of this court: 1st. Has the plaintiff acquired under the Treasurer's sale for taxes, the title of W. Gilbert, as it existed in his life-time, and free from the mortgage of his minor heirs, which arose after his death, and while the land was in possession of Lloyd Gilbert, their tutor? and, 2d. Have the heirs of Gilbert exhibited such evidence in the hypothecary action, as entitles them to have the land sold, in the hands of the heirs of Thibodeaux, as third possessors.

I. The only evidence exhibited in support of the plaintiff's title under the treasurer's sale, is his deed of conveyance to Suares. The land is described as a tract of ten arpents, more or less, situated in the parish of Lafourche Interior, and is declared to be sold for state taxes for the years 1813 and 1814. The sale for arrearages of taxes, took place on the 11th of February, 1828. The tract of land sold by Lloyd Gilbert to Winter, and by the latter to Thibodeaux, is described as a tract of ten arpents front on each side of the Bayou Lafourche and containing eight hundred superficial arpents. In addition to this striking discrepancy, this court has repeatedly decided that a title cannot be made out under a collector's or treasurer's sale for taxes, without exhibiting legal evidence of the original assessment of the tax due. In the present case no such evidence is offered, and we are of opinion that the treasurer's sale, conveyed no title. *6 Martin, N. S. 347. 7 Louisiana Reports, 46.*

II. In support of their claim in the hypothecary action, the heirs of Gilbert exhibit a judgment rendered in their favor, against the representatives of L. Gilbert, their former tutor, for twenty-one thousand four hundred and forty-five dollars. His appointment took place on the 2d of September, 1818. The tract of land in question became the property of Lloyd Gilbert in the year 1820, having been sold as a part of the estate of Walker Gilbert, purchased by Thomas C. Nicholls

6 M<sup>r</sup> 347  
7 M<sup>r</sup> 46  
10 M<sup>r</sup> 276  
4 M<sup>r</sup> 248

and by him conveyed to Lloyd Gilbert, who sold it to Winter two years afterwards. Under the provisions of the *Old Code*, in force at that time, the minors had a tacit mortgage on the property of their tutor, from the day of his appointment. *Old Civil Code, page 454, article 15.*

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The mortgage, therefore, in our opinion, attached to the tract of land in question, as soon as it became the property of the tutor. The judgment recovered by the minors, against their tutor or his legal representatives, is *prima facie* evidence of the amount due, the payment of which is secured by the legal mortgage. The judgment in this case, is not attacked as fraudulent or collusive. 1 *Louisiana Reports, 379.*

We are, therefore, of opinion, that the District Court did not err in ordering the land to be sold to satisfy the mortgage of the heirs of Gilbert.

But the appellees, the heirs of Thibodeaux, complain of the judgment rendered in their favor, in warranty, against Winter, by which the latter was condemned to pay only the price of the land, according to the original contract of the sale from Winter to their ancestor, whereas he ought to have been condemned to pay the value of the improvements made by them on the land, and such damages as they may suffer in the premises.

The judgment expressly reserves all questions in relation to improvements and damages, as well as for fruits and revenues between the different parties, for future adjudication, under an agreement found in the record.

X  
Under the *Civil Code of 1808, article 15, p. 454,* minors had a legal mortgage on the property of their tutor, from the day of his appointment: *Held,* also, that land, acquired during the tutorship, was subject to the mortgage of the minor.

A judgment, recovered by a minor, against his tutor when not attacked as fraudulent or collusive, is *prima facie* evidence of the amount due, the payment of which is secured by legal mortgage, when offered against a third possessor of the mortgaged premises.

8 M  
442

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs; and it is further ordered, that the case be remanded for further proceedings in relation to improvements.

X 7 M 361, 66 354, 3282  
10 L.R. 171-

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BLANCHARD  
vs.  
MAURIN

## BLANCHARD vs. MAURIN.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE  
THEREOF PRESIDING.

Where the note sued on and annexed to the petition, is described as bearing date in December, and the one offered in evidence, according to the report of experts, shows the Roman numeral X, was used instead of the word *December*: *Held*, to be properly admitted in evidence of the plaintiff's demand, notwithstanding the objection of the defendant on the ground of variance.

This is an action on a promissory note. The petition described the note to be for the sum of six hundred and fifty-two dollars, bearing ten per cent. interest from the 5th of December, 1825, as will appear by the defendant's note of that date, &c.; and he annexed said note for reference. He prays judgment thereon.

The defendant pleaded a general denial.

On the trial the plaintiff offered the note sued on, in evidence. The defendant objected, on the ground that there was a material variance between this note and the one declared on in the petition; the note now offered being dated in November, 1821, or at least, not dated on the 5th December, 1825, and the court overruled the objection (after having appointed experts, who reported on the date of said note) and received it in evidence. The defendant took his bill of exceptions.

Judgment was rendered for the amount of the note, and interest; from which the defendant appealed.

The original note was sent up with the appeal, for the inspection of the court.

*Nicholls*, for plaintiff.

1. The defendant not having formally denied his signature, the debt was proved, and the demand of plaintiff fully established.

2. The note is proved by experts, to be of the date alleged; there is no discrepancy or variance between it, as alleged and shown in evidence.

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BLANCHARD  
vs.  
MAURIN.

*Taylor*, for the defendant.

*Martin, J.*, delivered the opinion of the court.

The defendant was sued on his promissory note, bearing interest at the conventional rate. He pleaded the general issue, and on judgment being rendered against him, he appealed.

On the trial of the cause in the District Court, the defendant objected to the introduction of the note sued on, in evidence, on the score of a variance between it and that described in the petition. The alleged variance is in regard to the date. The petition described the note as bearing date the 5th of December, 1825. The original note was annexed to the petition, and comes up with the record. The word December is not very legible. Experts were called on in the District Court, who reported the word December was intended. The note was received in evidence notwithstanding the objection of the defendant.

As the case is presented, it appears to this court, the district judge did not err in receiving the note in evidence. As the original was annexed to the petition, there could be no material variance or surprise. On inspection of the note, it appears the word *December* was written, as is not uncommon among the French inhabitants, with the Roman numeral X, instead of *December*. This is not plainly done, but it is the most correct way of deciphering the date. Experts have reported so.

Where the note sued on and annexed to the petition, is described as bearing date in *December*, and the one offered in evidence, according to the report of experts, shows the Roman numeral X, was used instead of the word *December*: Held, to be properly admitted in evidence of the plaintiff's demand, notwithstanding the objection of the defendant, on the ground of variance.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

## CASES IN THE SUPREME COURT

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April, 1835.

GRAVIER'S  
CURATOR  
vs.  
CARABY'S EXECUTOR.

## GRAVIER'S CURATOR vs. CARABY'S EXECUTOR.

I APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF NEW-ORLEANS.

CP 565.566

7 M 457  
7 M 54.457  
3 ZN 443  
6 ZN 130  
8 ZN 202  
10 ZN 497  
1 ZR 223  
2 ZR 395  
3 ZR 437  
7 ZR 442  
12 ZR 488  
2 APR 321

A *mandamus* will not be awarded to compel the judge *a quo*, to allow an appeal from an interlocutory order which refuses to the defendant six months delay to procure papers and prepare his answer, when he can be relieved on an appeal from the final judgment, on showing that the judge erred in refusing him the delay asked for.

The defendant will not be allowed an appeal from an interlocutory order or decree, in order to avoid an appeal from the final judgment which may be rendered against him, because he may not be able to give security and procure a suspensive appeal.

Security must be given in every case according to law, in order to obtain a suspensive appeal, although it be a constitutional right.

This case comes before the court on an application for a *mandamus* to compel the judge of probates to allow an appeal from an interlocutory order.

The defendant alleges he is sued as the executor of Antoine Caraby in relation to transactions had with his testator and the late Jean Gravier, as far back as 1810. That his testator died in Paris, in 1832, where most of his papers are deposited; and that he, the executor, is wholly ignorant of the transactions out of which the plaintiff's demand has arisen. He filed his affidavit setting out all the facts and circumstances attending his case; and took a rule on the plaintiff, to show cause, why a judgment, which had already been rendered by default, should not be set aside, and that a delay of six months be allowed him to send to France and procure the necessary papers, to enable him to prepare his answer and make out his defence. On the hearing of this rule, the judge of Probates made an order discharging it and refusing the delay asked for. The defendant prayed an appeal, which was also refused.

The counsel for the defendant applied to the Supreme Court and obtained a rule on the judge of probates to show cause why a writ of *mandamus* should not issue commanding him to allow and send up the appeal as prayed for.

The judge showed for cause, that no appeal lies from an order refusing the defendant six months to answer the petition of the plaintiff. No appeal lies, except from final judgments; or from interlocutory judgments, when they cause an irreparable injury. *Code of Practice*, 565 and 566. *Merlin's Rep. de jur. verbo, interlocutoire.*

2. The application for the delay to file an answer to the merits, was not made until after judgment by default, when according to law such an application could not be received. *Code of Practice*, 316.

3. The question of granting this delay was discretionary with the court, and as this respondent believes, was not necessary for the purposes of justice.

4. After filing the answer, the defendant might, according to law and the rules of court, have obtained a commission to procure the evidence necessary to his defence, if such existed.

5. From the showing made, this respondent was induced to believe that procrastination was the chief object in asking for the delay.

6. The facts alleged on behalf of the defendant to obtain the *mandamus* are sworn to by his counsel and not by the defendant, as is required by law. *Code of Practice, article, 840.*

*D. Seghers*, for the defendant in support of the application for the *mandamus*.

*Martin, J.*, delivered the opinion of the court.

The counsel for the defendant obtained a rule in this court on the judge of the Court of Probates, for the parish and city of New-Orleans, to show cause why a writ of *mandamus* should not issue commanding him to allow an appeal from a judgment discharging a rule taken on the plaintiff; to show cause why a judgment by default should not be set aside and

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GRAVIER'S  
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A *mandamus* will not be awarded, to compel a judge *a quo* to allow an appeal from an in-

## CASES IN THE SUPREME COURT

EASTERN DIST. six months allowed him, the defendant, to prepare and file  
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 CARABY'S EX'R.**  
 interlocutory order, which refuses to the defendant six months delay, to procure papers and prepare his answer, when he can be relieved on an appeal from the final judgment, on showing that the judge erred in refusing him the delay asked for.

The judge of probates appeared and showed for cause why the *mandamus* should not issue: 1st. That the appeal prayed for, is from an interlocutory order, which may indeed be productive of delay, but cannot occasion any other injury not susceptible of being redressed or relieved against, by an appeal from the final judgment, which might intervene. The order complained of, was one refusing to the defendant a delay of six months, in order to send to France for certain papers, which are alleged and deemed necessary, before filing an answer, to establish the defence of the case.

The judge stated the motives of his refusal, which it is now unnecessary to examine. If the final judgment be against the defendant, and he sees fit to appeal therefrom, there cannot be a doubt of his right to obtain relief, if he can show that the judge erred in refusing him the delay he requested.

It has, however, been urged by the defendant's counsel in the argument of this case, that the defendant may possibly be precluded from relief in this court in case of a final judgment being given against him, by his inability to procure the necessary security to obtain a suspensive appeal.

This argument proves too much. For it was admitted an appeal might be claimed from every interlocutory decree.

The legislature has presumed that every one, who has a claim to be relieved on appeal to this court, is able to give security. This is required by law; and no provision has been made for a contrary case. Nothing, therefore, enables us to remove the obstacle, which the law has created in this respect, to the exercise of a constitutional right.

The rule is therefore discharged with costs.

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PALFREY  
vs.  
WINTER.

**PALFREY vs. WINTER.**

**APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE  
THEREOF PRESIDING.**

The transcript of the record may be filed within three judicial days after the return day.

Within the three judicial days of grace, the appellant may obtain further time, on showing cause. But, at the expiration of the three days, the appellee may obtain a certificate from the clerk, that the appeal has not been prosecuted, and have execution on the judgment below, or procure a dismissal of the appeal, on filing the transcript. He is not bound to answer after the expiration of the three days' grace.

The rule that, when an act is to be done within a given time, it may be done afterwards, if nothing occurs to prevent it, does not apply to the case of filing a transcript of the record on appeal.

This was an action of slander. The plaintiff had a verdict and judgment against the defendant, for five hundred dollars in damages, and the costs of suit; from which the latter appealed.

The appeal was granted on the 9th December, 1834, and made returnable on the third Monday of January following. The transcript of the record was filed in the clerk's office of the Supreme Court, on the 2d day of February, 1835.

*Dibieux*, for the plaintiff, moved to dismiss the appeal, on the following grounds:

1. That the transcript of the record was not filed in time, not having been returned into the court on the return day, nor within the three days following it.
2. The appeal is evidently taken for delay; and damages, as for a frivolous appeal, should be awarded.

*Winter*, in *propriâ personâ*, urged in excuse of the delay in bringing up the record, that he lived at a distance, and supposed it was returned in time.

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vs.  
WINTER.

2. The appeal is not taken for delay, but from the most honorable motives of the human heart, to promote truth and justice, and resist prejudice, falsehood and injustice: "let justice be done, though the heavens shall fall!"

*Bullard, J.*, delivered the opinion of the court.

The appellee moves the dismissal of the appeal in this case, on the ground that the transcript was not filed in this court on the return day, nor within the three judicial days afterwards. The appeal was made returnable on the third Monday of January, and the transcript was not filed until the second day of February.

It has been settled, by several decisions of this court, that a transcript may be filed within three judicial days after the return day. *5 Martin, N. S.*, 191. *7 La. Reports*, 350.

Within the three judicial days of grace, the appellant may obtain further time, on showing cause. But at the expiration of the three days, the appellee may obtain a certificate from the clerk, that the appeal has not been prosecuted, and to proceed to the execution of the judgment below, or to procure the dismissal of the appeal on filing a transcript. It appears to us, the appellee cannot be legally deprived of his right, by the act of the appellant, after the expiration of the three days, without permission of the court. It is true, the Code requires that the appellee who wishes to move for a dismissal of the appeal, in such cases, should bring up the transcript. In this case, the transcript is already before us. The appellee was cited to appear in this court on the third Monday of January, and the record was not brought here until the commencement of the succeeding term, without any application to the court for further time, or any cause shown; and we are of opinion that the appellee is not bound to answer.

The rule that when an act is to be done within a given time, it may be done afterwards, if nothing occurs to prevent it, does not apply to the case of filing a transcript of the record on appeal. like, it may be done afterwards, if nothing occurs to prevent

In the case of *Griffith et al. vs. Minor*, *7 Louisiana Reports*, 350, it was intimated, though not decided, with reference to filing an appeal, that as a general rule, when an act is to be done within a given time, as the filing an answer and the

it. We are now satisfied that the rule does not apply to the bringing up of a transcript of appeal.

EASTERN DIST.  
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It is, therefore, ordered, that the appeal be dismissed, at the cost of the appellant.

STANLEY  
vs.  
ADDISON ET AL.

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STANLEY VS. ADDISON ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A *certified copy* of a deed or private act of sale, signed by the vendor and two witnesses, and recorded in the parish judge's office, is admissible and competent evidence to prove title to the property, when one of the subscribing witnesses swears, the vendor told him, in his life-time, that he had destroyed the original deed.

Where the destruction of a deed is only proved by a single witness, who testified to the declaration of the vendor, that he had destroyed it in a drunken frolic: *Held*, that the proof is sufficient and legal, as the witness was not called on to prove a contract; but only to testify to a fact. Evidence of the confessions of the vendor, under whom the plaintiff claims in this case, is sufficient to prove the loss of the original deed.

A vendee only incurs, in ordinary cases, the obligation to pay the price; and when that is acknowledged in the act to have been paid and received by the vendor, the signature of the vendee is not necessary to bind him or to show that he assented to the sale. His assent may be proved *aliunde*.

This is an action to recover from the defendants, a lot of ground in the faubourg Lafayette. The plaintiff alleges he purchased it from one P. L. Nott, now deceased, on the 26th March, 1829, as appears by a deed or bill of sale signed by the vendor in the presence of two subscribing witnesses, and recorded in the parish judge's office, for the parish of Jefferson, *a true copy of which is annexed to his petition*.

Addison, one of the defendants, claimed an interest in this lot as making part of the succession of Nott, on the ground

EASTERN DIST. that he was universal legatee. He let judgment go by default.  
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vs.  
ADDISON ET AL. Eliza Nott, daughter of the vendor and wife of Doane, was cited, and answered by pleading a general denial. She avers, she is the forced heir of her father, and had adjudged to her one-half of his succession, of which, the lot in question makes a part ; and that the plaintiff has no title to it.

On the trial, M'Carty, a witness for the plaintiff, declared, "that he was applied to by Nott, about four or five years ago, to draw up the bill of sale or deed for the lot in contest, which was signed by Nott, the vendor, and by two witnesses, including himself; that he directed Nott to take it to the parish judge's office, and have it recorded. The price of the lot was what is stated in the copy produced. Nott told witness, that in a drunken frolic, he had destroyed the bill and act of sale, and asked what would be the consequence ; witness told him, that as to the bill of sale, it was no consequence, as it was recorded."

The plaintiff offered a certified copy of the bill of sale, from the parish judge's office, in evidence, the reading of which was objected to by the defendant, first, on the ground that there is no proof of its being a copy of the original act; second, that it is not completed, as it is not signed by Stanley, the vendee, as there is no proof that he assented to the act; third, the destruction or loss of the original act was not advertised. The court overruled the objections, and the defendants took a bill of exceptions. There was judgment for the plaintiff, that he recover the lot in question. After an unsuccessful attempt to obtain a new trial, the defendants appealed.

*Preston*, for the plaintiff.

In this case, judgment has been rendered on legal and sufficient evidence, and should not be disturbed.

*M'Mullen*, contra, contended, that judgment was rendered on the parole testimony of a single witness, when the suit is based on a written contract, which is insufficient. The

necessary legal steps were not taken, to authorise the copy of EASTERN DIST.  
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the alleged bill of sale to be read in evidence, and recover STANLEY  
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2. It is not proved that Nott, the vendor, ever signed the act of sale, or that Stanley ever accepted it.
3. The amount or value of the property claimed, is over five hundred dollars, and only one witness offered to support it; the plaintiff should have been non-suited.
4. The judgment is void on its face, because no reasons are given for it.

*Martin, J.*, delivered the opinion of the court.

The plaintiff instituted suit, in which he seeks to be declared the true and legal owner of a lot of ground in the faubourg Lafayette, to which the defendants lay claim; one of them as legatee, and the other, as heir of the plaintiff's vendor.

On the trial of the cause, in the District Court, judgment was rendered by default, against one of the defendants; and, against the other, on the plea of the general issue. From this judgment, both of the defendants appealed.

The attention of this court has first been called to a bill of exceptions, taken to the decision of the District Court, admitting a copy of the deed, under which the plaintiff claims, in evidence. Its admission was objected to, on the ground that, being an act under private signature, made by the grantor, its execution was not proved according to law; that the loss or destruction of the original instrument, was supported and proved entirely by hearsay evidence, and by one witness only, when the lot or property in contest is worth more than five hundred dollars.

The grounds stated in the bill of exceptions, on which this copy was admitted in evidence, are, that it was proved that the grantor had caused the original deed to be recorded. The evidence shows that the grantor requested a person, who also appears to be one of the subscribing witnesses to the deed, to prepare it; and that he executed it in the presence of that person and another subscribing witness, and the

*A certified copy  
of a deed or pri-  
vate act of sale,  
signed by the  
vendor and two  
witnesses and re-  
corded in the*

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parish judge's office, is admissible and competent evidence to prove title to the property, when one of the subscribing witnesses swears the vendor told him in his lifetime that he had destroyed the original deed.

Where the destruction of a deed is only proved by a single witness, who testified to the declarations of the vendor, that he had destroyed it in a drunken frolic: Held, that the proof is sufficient and legal, as the witness was not called to testify as to a contract, but to a fact, the destruction of a deed. He gave evidence of the confession or admission of the grantor, the person under whom the defendants claim. The absence of proof of the grantee's having signed the deed, or of his assent thereto, ought not to have prevented its admission. The effect of the absence of this evidence, before the recording of the deed, was a matter of posterior consideration.

The deed being legally proved to have been unintentionally destroyed by the grantor, evidence of its contents results from the declaration of the witnesses, and the copy given by the parish judge, of what is written and inscribed on his records.

On this evidence, a jury, or the court of the first instance, may well have concluded, that the deed once existed, and that its contents were proved. If, however, the jury had come to the opposite conclusion, this court would not have been necessarily bound to reject it; but, we are not to say that the judge erred in considering the deed as proved.

The deed acknowledges the receipt of the price, and the subscribing witness says, the consideration was a sum due by the grantor, to the grantee. As a vendee incurs no

grantee, the present plaintiff. After the deed was signed and witnessed, in the presence of the parties, it is shown that the person who drew up the instrument, advised the grantor to carry it to the office of the parish judge, and have it recorded. The grantor afterwards informed this person, he had destroyed the deed, whilst in a drunken frolic, and asked what the consequences of such an act would be, and was answered, that, as the deed was recorded, the destruction of it was immaterial.

It has been contended in argument, and relied on by the defendants, in this court, that the judge *a quo* erred in admitting this evidence; because, the destruction of the deed was only proved by a single witness, who testified to what he heard others say; and, because the deed was not signed by the grantee, and that there was no evidence of his assent thereto.

This court is of opinion, the district judge did not err in this matter. The witness was not called to testify as to a contract, but to a fact, the destruction of a deed. He gave evidence of the confession or admission of the grantor, the person under whom the defendants claim. The absence of proof of the grantee's having signed the deed, or of his assent thereto, ought not to have prevented its admission. The effect of the absence of this evidence, before the recording of the deed, was a matter of posterior consideration.

A vendee only incurs, in ordinary cases, the obligation to pay the price; and when that is acknowledged, in the act, to have been paid and received by the vendor, the signature of the vendee is not

obligation in an ordinary contract of sale, except that of paying the price, which, in the present case, is acknowledged to have been paid, it is clear, his signature was not needed to bind him. His assent might be proved *aliunde*. It may be inferred, in the present case, from his presence at the execution of the deed, and his subsequent claim under it.

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April, 1835.

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vs.  
PILE ET AL.

necessary to bind him or to show that he assented to the sale. His assent may be proved *aliunde*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

#### ZANDER vs. PILE ET AL.

##### APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A curator's bond is the evidence of a contract, on which a civil action may be instituted in the courts of ordinary jurisdiction.

The Court of Probates, is one of limited jurisdiction, which cannot be extended to any case not especially placed within its attribution.

This is an action on a curator's bond, in the District Court of the state. The widow of the late John Pile, who died in New-Orleans, obtained the curatorship of his estate, and gave bond in the penal sum of three thousand seven hundred and fifty dollars, with Thomas Copping as surety. The bond was taken and filed in the Court of Probates.

The plaintiff alleges, that the curatrix rendered her account to the Court of Probates without placing him thereon, either as an ordinary or privileged creditor. That on his opposition, the account rendered was set aside and another ordered, on which he was to be placed as a creditor of the estate of Pile, for three thousand two hundred and nine dollars, part of it a privileged claim. He also shows the curatrix has neglected and refused to render another account, although again ordered, by reason of which both her and her surety are liable

## CASES IN THE SUPREME COURT

EASTERN DIST. *in solidō*, on their bond. He therefore prays judgment April, 1835.

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The defendants pleaded to the jurisdiction of the District Court; and that the case belonged of right to the Probate Court, where the succession of Pile was opened, and which remained still unsettled.

The district judge was of opinion the District Court had no jurisdiction of an action on a curator's bond; but even if the curator's surety was suable on the bond, before this jurisdiction, he is not suable by an individual creditor of the succession. Judgment was rendered dismissing the petition. The plaintiff appealed.

*Buchanan*, for the plaintiff, urged that the District Court had jurisdiction, inasmuch as the present suit is against a curatrix and her surety, on their bond, not in a representative but in a personal capacity.

2. The District Court is vested with jurisdiction, by reason of the subject matter, as has been often decided by this court. 5 *Martin*, 630. 3 *Martin, N. S.*, 139. 5 *Ibid.*, 217. 6 *Ibid.*, 548, 7 *Ibid.*, 376. 8 *Ibid.*, 241, 510. 5 *La. Reports*, 322.

3. The jurisdiction of the Probate Court is limited to particular cases, within which the present action does not fall. *Code of Practice*, 924-5.

4. The different remedies in cases where a curator refuses to account, are pointed out by law. *Code of Practice*, article 1012, particularly the latter clause.

*L. C. Duncan*, for defendant, relied on the authorities cited on the trial by the judge *a quo*. See *Code of Practice*, articles 993-4, 1011, 1012.

*Martin, J.*, delivered the opinion of the court.

This is an action against the principal and surety in a curator's bond. The defendants pleaded to the jurisdiction of the District Court. The plea was sustained, and the plaintiff appealed.

We agree with the learned judge of the First District Court,

that it might be better, that the bonds taken by the Court of Probates from curators, should be acted upon by *scire facias* in that court, exclusively; being considered as recognizances, or conditional judgments. But a bond is the evidence of a contract, on which a civil action may be instituted, and we know of no law which authorises a court of ordinary jurisdiction to refuse its aid, to a suitor in a civil action, the cognizance of which is not exclusively given by law to any particular court, merely because it would be much better that the latter should entertain exclusive jurisdiction of the matter.

This court sees no good reason to change the opinion we expressed in the case of *Elliott, administrator, vs. White.* 5 *Louisiana Reports, 322.* *Monroe vs. McMickin.* 8 *Martin, N. S., 510.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; the plea or exception to the jurisdiction of the court be overruled, and that the case be remanded for further proceedings according to law; the appellees paying costs in this court.

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April, 1835.

WALLER  
vs.  
LEA

A curator's bond is the evidence of a contract, on which a civil action may be instituted in the courts of ordinary jurisdiction.

The Court of Probates is one of limited jurisdiction, which cannot be extended to any case not especially placed within its attribution.

#### WALLER vs. LEA.

#### APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a resident of New-Orleans, on the 28th February, gave notice to the parish judge of the parish of St. Tammany, that he had changed his domicil to that parish, since the 1st of January past, but omitted to notify the parish judge of New-Orleans, of his intention to change his domicil, and did not actually remove until suit and service of citation on him, the 9th of April following: *Held,* that he was properly sued at his legal domicil, and that the District Court, sitting in the parish of New-Orleans, has jurisdiction of the case.

**E ASTERN DIST.** A change of domicil is produced by the *act of residing* in another parish, April, 1835. combined with the intention of making one's principal establishment there.

**WALLER**

*vs.*

**LEA**

This is an action in which the plaintiff seeks to recover damages to a large amount from the defendant, for an alleged breach of contract, on the part of the latter, in failing to employ and compensate the former, as a deputy clerk in his office, as clerk to the United States District Court, for the Eastern District of Louisiana.

The suit was instituted in the First District Court, for the state of Louisiana, sitting in New-Orleans; and citation was served on the defendant, the 9th of April, 1834.

The defendant excepted to the petition, and averred that he was a resident of the parish of St. Tammany, where his domicil had been established, long prior to the institution of this suit; and that he is not answerable to the jurisdiction of the District Court of Louisiana, sitting in New-Orleans.

The evidence showed that the defendant intended, as early as September, 1833, to remove his domicil from New-Orleans, to the parish of St. Tammany; that in February, 1834, he resigned his office as clerk of the United States Court, for the Eastern District of Louisiana, and on the 28th of that month, made his declaration in writing, before the parish judge of St. Tammany, that he had changed his domicil and residence from New-Orleans to that parish, since the 1st day of January past. Early in April, he sent his slaves and furniture, and *actually removed with his family*, on the 16th of April, 1834, to his new domicil in the parish of St. Tammany.

The district judge was of opinion the evidence was sufficient to establish the legal domicil of the defendant in St. Tammany, at the period of commencing this suit; and sustained the exception, by dismissing the plaintiff's petition. The latter appealed.

*Waller, in propriâ personâ.*

*J. Slidell, contra.*

*Bullard, J.*, delivered the opinion of the court.

The defendant being sued in the court of the first district, pleaded that he is a resident of the parish of St. Tammany, where he avers his domicil was established at a period long prior to the institution of the suit. The court having sustained his exception, the plaintiff appealed.

It is not denied that the defendant was for a long time domiciliated and had his residence in the city of New-Orleans, where he held the office of clerk of the District Court of the United States. It appears, that on the 28th February, 1834, he gave notice to the parish judge of the parish of St. Tammany, that he had changed his domicil from New-Orleans to that parish, where he had fixed it since the 1st of January past. He gave no notice to the parish judge of the parish of New-Orleans, of his intention to change his domicil, nor did he finally remove with his family, from the city, until after the commencement of this suit.

Our only inquiry must be, whether, on the 9th of April, 1834, when service of citation was made on the defendant, he had legally changed his domicil, so as to deprive the court of the first district of jurisdiction.

"A change of domicil is produced by the *act of residing* in another parish, combined with the intention of making one's principal establishment there." *Louisiana Code*, 43.

The intention alone, however formally expressed, would not suffice; it must be complied with by the *act of residing* in the new parish. If the defendant had made his declaration according to the Code, before both of the judges of the parishes from and to which he intended to remove, the *act of removing* would have created a change of domicil. When such declaration is not made, the proof of *this intention* will depend on circumstances. *Louisiana Code, article 45.* 13 *Sirey, 2d part, 353.* 8 *Martin, 709.* 9 *Martin, 491.* 4 *N. S., 57.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, the

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WALLER  
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Where a resident of New-Orleans, on the 28th February, gave notice to the parish judge of the parish of St. Tammany, that he had changed his domicil to that parish, since the first of January past, but omitted to notify the parish judge of New Orleans, of his intention to change his domicil, and did not actually remove until suit and service of citation on him, the 9th of April following: Held, that he was properly sued at his legal domicil, and that the District Court, sitting in the parish of New-Orleans, has jurisdiction of the case.

A change of domicil is produced by the *act of residing* in another parish, combined with the intention of making one's principal establishment there.

## CASES IN THE SUPREME COURT

EASTERN DIST. non-suit set aside, and the case remanded for further  
April, 1835. proceedings therein, according to law, and that the appellee  
CROCKER pay the costs of this appeal.

CROCKER  
vs.  
WILLIAMSON  
ET AL.

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## CROCKER vs. WILLIAMSON ET AL.

## APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a judgment has been rendered against a principal debtor for a certain sum, and against the third possessor of the mortgaged premises, and the latter alone appeals, the appellee cannot have the judgment amended on the appeal, so as to increase the amount, or affect the interests of the debtor.

The original debtor is not before the court on appeal, when his vendee, the third possessor, alone has appealed; and his interests cannot be affected by an alteration of the judgment, as respects him, without making him a party.

This suit is instituted on three several promissory notes, executed by the defendant Williamson, and protested for non-payment, amounting in all to two thousand nine hundred and forty dollars. The notes were secured by a mortgage on certain leased premises, which Williamson occupied as assignee of the original lessee, who leased it from one John Mooney. After the notes were due, Williamson sold and assigned his leasehold to one Oliver Akin, who is in possession, for two thousand dollars. Akin accepted the lease, subject to all the mortgages, pledges and incumbrances.

Williamson pleaded a general denial, and let judgment go for the amount of the notes, with interest.

Akin pleaded the general issue; and that the premises in contest belong to John Mooney, for whom he holds possession as tenant and calls him in warranty.

Mooney answered and averred, he was the possessor or owner of the property, but acknowledged the lease, which Williamson sold to Akin; and as the property itself was not claimed, he denied his liability in warranty.

Judgment being rendered against Williamson for the amount of the notes, with ten per cent. interest on one until paid; and five per cent. from judicial demand on the others; and it was ordered, that the mortgaged leasehold be seized and sold to satisfy said judgment. The warrantor was discharged. Akin, the third possessor alone appealed.

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ET AL.

*Strawbridge*, for the plaintiff and appellee, alleged error in the judgment to his prejudice, in not allowing him the full amount of interest on all the notes; and that it be amended in this respect. See *Acts of 1822*, section 24.

2. The appellant having failed to bring up the transcript, the appellee has done it, and claims to have the judgment amended. *Code of Practice*, 884.

3. If the appellee prefer to have judgment, he may bring up the record and pray judgment, in the same manner as if it had been brought up by the appellant. *Code of Practice*, 590.

*Nixon*, for the appellant.

*Bullard, J.*, delivered the opinion of the court.

This suit was instituted against the defendant, Williamson, to recover the amount of certain promissory notes, secured by mortgage, and Akin, the third possessor of the mortgaged premises, was made a party. Judgment was rendered against Williamson for the amount due, and the mortgaged property was ordered to be sold. The third possessor, alone, appealed.

The appellant having failed to bring up a transcript of the record, the plaintiff and appellee brings it into this court, and prays an amendment of the judgment below, so as to allow him a higher rate of interest on one of the notes. We think this cannot be done. The debtor is not before the court, and we cannot alter the judgment, as it relates to him, without

Where a judgment has been rendered against the principal debtor, for a certain sum, and against the third possessor of the mortgaged premises, and the latter alone appeals, the appellee cannot have the judgment amended on the appeal, so as to increase the amount, or affect the interests of the debtor.

The original debtor is not before the court on appeal, when the vendee, the third possessor, alone has appealed;

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April, 1835.

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vs.  
DRANE.

and his interest  
cannot be affected  
by an altera-  
tion of the judg-  
ment, as re-  
spects him,  
without making  
him a party.

making him a party. The only question between the plaintiff and Akin, the third possessor, in the court below, was, whether the property in his possession was liable to be sold, to satisfy such judgment, as should be recovered against Williamson. We cannot increase the amount of the judgment without affecting Williamson, who is not a party to the appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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#### PETIT ET AL. vs. DRANE.

##### APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

The appellee must be cited to the *next term* after granting an appeal, if there is sufficient time, after allowing him the same delay which is granted to defendants, in ordinary cases.

So, where the appellees reside in New-Orleans, and an appeal was granted on the 22d of January, and made returnable to the first Monday in March following: *Held*, to be illegal, and the appeal was dismissed. It should have been made returnable to February term, being the next; and the appellees cited accordingly.

The law does not require that the appellee be cited to the *first* Monday, nor to any particular day of a term; but only to the *next* term, after allowing the ordinary legal delay.

So, if an appeal is made returnable to the *second* term, when there was time to have cited the appellee to the first term, after it was allowed, it will be dismissed.

This case comes up on a second appeal, the first having been dismissed for want of service of citation of appeal on the appellees, who were residents of the state. See case, 7 *Louisiana Reports*, 483. The defendant's counsel took a

rule, within the year after the rendition of the original judgment, on the plaintiff and appellees, to show cause why a new appeal should not be allowed.

On hearing the arguments of counsel, and on satisfactory evidence being produced that the costs of the first appeal were paid, the parish judge was of opinion the defendant, under arts. 594-5 of the *Code of Practice*, was entitled to a new appeal. An appeal was accordingly granted on the 22d January, 1835, returnable to the first Monday of March following.

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vs.  
DRAKE.

*Benjamin*, for the plaintiffs and appellees, moved to dismiss the appeal, on the following grounds :

1. The appeal must be dismissed, because it is not returnable to the proper term. *Code of Practice*, 583. 3 *Louisiana Reports*, 251, 467. 4 *Ibid.*, 280.

2. The bond is not given according to law. It is not for the amount fixed by the judge, but that fixed by the appellant himself. *Code of Practice*, 574, 578. 2 *Louisiana Reports*, 87.

3. The first appeal in this case was dismissed, and the law does not allow a second appeal under such circumstances. *Code of Practice*, 594, 595, 901.

4. The appeal is not brought up in such a shape as to enable the court to examine the case on the merits. Evidence not all taken down ; and not all in the record which was adduced on the trial ; and the statement of facts was made after the appeal. *Code of Practice*, 601, 602, 603. 3 *Louisiana Reports*, 297, 445. 5 *Ibid.*, 321.

5. There is no assignment of error, and the only bill of exceptions is immaterial to the decision of the cause.

*Carleton and Lockett*, for the defendant, contended, that the appeal must be made returnable to the *next* term : the terms were construed to mean, from month to month ; hence, the return day was made the first Monday in every month. When an appeal is taken on the last days of a month, the delay of ten days, as in ordinary suits, must necessarily

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elapse after the beginning of the next term; and the beginning of the *next term thereafter*, is, in such cases, almost invariably made the return day.

2. The return day is fixed by the judge, and time must be given to make out the transcript. Suppose an appeal was granted on the last days of a month, and it was physically impossible for the clerk to make out the transcript during the following month, so that it might be filed, might not the judge exercise a discretion, and fix the return for the second term or month?

3. When the appellee lives at a great distance, time must be allowed, in addition to the ordinary delay, to cite him. This time, or, at least, the distance must be left to the discretion of the judge, and the return day fixed accordingly.

The judge calculates the distance from the best means in his reach, and fixes the return day in the second month; and the appellee moves to dismiss the appeal, because he can show the distance is not so great, and he might have been cited to the next month or term: would the appeal be dismissed? Surely not. *8 Martin, N. S.*, 597.

4. The appellee could only dismiss the appeal in such a case as this, when it operates a stay of execution, and he is kept out of his money. In this case, security is only given for costs: the appeal is not suspensive. *3 Louisiana Reports*, 441, 467, 468.

*Martin, J.*, delivered the opinion of the court.

In this case, the counsel for the plaintiffs and appellees have prayed for the dismissal of the appeal [among other grounds] on the score of its being made returnable to too distant a day.

The appeal was granted on the 22d of January, and made returnable on the first Monday of March following. The *Code of Practice*, art. 583, requires that the appellee be cited at the *next term* of the Supreme Appellate Court, if there be sufficient time for doing so, after allowing him the same delay which is granted to defendants in ordinary cases. The

The law does not require that the appellee be cited to the *first* Monday, nor on

appellees, in this case, reside in the city of New-Orleans. It is clear, therefore, that they might have been cited to appear on some day in the month of February, following the granting the appeal, *which was the next term* of the Appellate Court.

Nothing requires that the appellee should be cited on the *first* Monday of a term, nor on any particular day of a term; but, that he must be cited to the *next* term, if there be sufficient time between the return day, and that on which the appeal was granted, to cite him in, according to law.

This appeal, therefore, was improperly made returnable to the *second* term, after it was allowed, when there was sufficient time to have cited the appellee to the *next term* thereafter.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed, with costs.

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April, 1835.

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CREDITORS.

any particular day of a term; but only to the *next term*, after allowing the ordinary legal delay.

So, if an appeal is made returnable to the *second* term, when there was time to have cited the appellee to the first term, after it was allowed, it will be dismissed.

#### ALLEN & DEBLOIS vs. THEIR CREDITORS.

#### APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

Opposition to the appointment of syndics, by a creditor, must be made *within* the ten days next following the appointment before the notary.

So where the tenth day following the appointment of syndics, was Sunday, and the opposition of a creditor was filed on Monday, being the eleventh day thereafter: *Held*, that it was in time, because all judicial proceedings are forbidden on Sundays, and the party is entitled to his ten full legal days.

The plaintiffs filed their petition the 5th June, 1834, and made a cession of their property for the benefit of their

## CASES IN THE SUPREME COURT

**EASTERN DIST.** creditors, which was accepted by the judge, and a meeting  
April, 1835. of their creditors ordered to take place before a notary public,  
**ALLEN & DEBLOIS** on the 23d of the same month.

**vs.**  
**THEIR**  
**CREDITORS.**

The proceedings of the creditors before the notary, closed on the 26th of June, and were returned into court. The plaintiffs were appointed their own syndics.

On the 7th of July, following, M'Mahon and wife filed their opposition to the proceedings of the creditors in appointing syndics, and denying to the insolvents the right to be syndics, or to obtain the benefit of the insolvent laws, on various grounds. This opposition was objected to, and a rule taken by the syndics of the creditors to show cause why it should not be dismissed, as not having been filed until after the expiration of the legal delay allowed by law.

On hearing the rule, the parish judge was of opinion the opposition was not filed in time; and he made an order dismissing it. The opposing creditors appealed.

It appeared in proof that the tenth day after the proceedings before the notary closed was Sunday, and that the opposition was filed on Monday.

*Hoffman and Eustis, for the appellants.*

1. This opposition was first recognised and contested, on grounds other than those of not being filed in time. It could not be contested afterwards, on the ground of not being filed in time. *5 Louisiana Reports, 256.*

2. The time allowed within which to file an opposition, had not expired when this was offered, because the tenth day was Sunday, which should not be counted.

3. Sunday being the day on which, according to the *Code of Practice, article 318,* the opposition was to be made, and not being counted, the party had all the next day to file his opposition.

*Benjamin and Pierce, contra.*

1. The meeting of creditors was closed before the notary on the 26th June. The opposition was filed on the 7th July, i. e. not within the *ten days next following the appointment of the*

*syndics*, as required by the *Act of 1817, section 18.* 2 *Moreau's EASTERN DIST. Digest*, 429.

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CREDITORS.

2. Being after the lapse of ten days, it is too late and must be dismissed. 2 *Martin, N. S.*, 57. 2 *Louisiana Reports*, 217 and 358.

3. The proceedings of the creditors having become final by the mere lapse of the ten days, and no judgment of homologation being required by law, the proceedings form *res judicata* as against the opposing creditors. See case of *Goodale vs. His Creditors*, recently decided.

*Bullard, J.*, delivered the opinion of the court.

The only question in this case is, whether the opposition was filed within the delay allowed by law. It is now settled that such opposition must be made within the ten days next following the appointment of syndics before the notary.

In the present case, the tenth day was Sunday, and the opposition was filed on the next day. It cannot be said that the opponent was too late on Saturday night, because the law allows ten days, and at least any time within the tenth day would suffice. But the tenth day happened to be not a judicial day, and it was impossible to file the opposition on that day, all judicial proceedings being forbidden. If we should say, that the opposition comes too late, we should deprive the opposing creditor of one day allowed by law, or compel him to do, what is legally impossible. We are, therefore, of opinion, that the opposition was not too late.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be reversed and annulled, and the rule discharged, and the case remanded for proceedings on the opposition according to law; the appellees paying the costs of this appeal.

Opposition to the appointment of syndics, by a creditor, must be made *within* the ten days next following the appointment, before the notary.

So, where the tenth day following the appointment of syndics, was Sunday, and the opposition of a creditor was filed on Monday, being the 11th day thereafter: *Held*, that it was in time, because all judicial proceedings are forbidden on Sundays, and the party is entitled to his ten full legal days.

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April, 1835.

STOCKTON  
vs.  
TRUXTON.

STOCKTON vs. TRUXTON.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF  
NEW-ORLEANS.

The penalty which the law denounces, by depriving a party of every other means of defence, who expressly denies his signature, and it is proved by his adversary, is not incurred by the denial of his having made and executed the note sued on, or to which his signature is attached.

Although an express denial of every allegation, is an express denial of each one; yet the plea of the general issue, does not waive others; and an express and special denial of the signature, is required before the party is debarred from every other plea, on proof being made of his signature.

This is an action on a promissory note, signed by the defendant, (he making his ordinary mark) for five hundred and fifty dollars, secured by a mortgage on a slave. The plaintiff instituted his suit about a month before the note became due and payable; alleging, the defendant was about to remove the slave out of the state, and prayed to have her provisionally seized; that he have judgment on the note, when it became due; and that the said slave be sold to satisfy the same.

The defendant pleaded the general issue; and specially averred, that he is entirely ignorant of, and denies ever having made to the said Stockton, any such note or mortgage; and if he did make or give any such, it was in manner, and under circumstances the most fraudulent: and that they were extorted from him without any consideration or equivalent being paid therefor; and that no amicable demand was made. He prays that the note and mortgage be annulled, the provisional seizure set aside, and that the plaintiff's demand be rejected, with costs.

The cause, on these pleadings, was tried before a jury. The defendant offered witnesses to prove a want of consideration in the note sued on, and fraud in the execution of it

and the mortgage ; and that the latter is not made by a notarial act. The plaintiff's counsel objected to the introduction of the evidence offered ; which objections were sustained by the court, on the ground, that there had been a special denial of the signature to the note, and that it had been proved, which barred the defendant from every other defence. *Code of Practice*, 326. The defendant's counsel excepted to the opinion of the court.

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No evidence was offered or appeared in the record, on the part of the plaintiff. The jury, however, under the charge, returned a verdict in favor of the plaintiff, for the amount of the note ; upon which judgment was entered, conformably to the prayer of the petition. The defendant appealed.

*I. W. Smith* and *M'Henry*, for the defendant and appellant.

1. The judge *a quo* erred in adjudging the seizure and sale of the slave ; the jury having limited their verdict to the sum claimed, and not having found a verdict with regard to the mortgage.

2. The testimony offered to prove a want of consideration of the note and fraud in the act, was admissible under the pleadings, and improperly rejected by the inferior court ; the answer, *when taken in all* its parts, showing the signature of defendant to have been admitted ; and the judge *a quo* having put that construction on it, as appears by the bill of exceptions.

3. Interest was improperly allowed by the court, none having been found by the jury, and none having been legally due.

4. The defendant was improperly decreed to pay costs in the inferior court, having pleaded specially, the want of amicable demand ; and no proof having been adduced that such demand was made.

5. Should the court consider the signature of the note, *not* to have been admitted by the answer, then the verdict and judgment are erroneous, for want of proof of the signature of the defendant.

*Roselius, contra.*

EASTERN DIST.  
April, 1835.

STOCKTON  
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*Martin, J.*, delivered the opinion of the court.

The defendant being sued on his promissory note, secured by a mortgage on a slave for five hundred and fifty dollars, resists the plaintiff's action, by a denial that he made and executed the note and mortgage sued on, and on other grounds.

At the trial of the cause, the defendant offered witnesses to prove a want of consideration in the note sued on, and fraud in its execution as alleged, and that the act of mortgage is not a notarial act. This evidence was objected to, on the part of the plaintiff, and the objection sustained by the court, on the ground, that the answer of the defendant contained a special denial of his signature, and the signature having been duly proved, the party was precluded from availing himself of any other plea or defence. *Code of Practice, article 326.* A bill of exception was taken to the decision of the court. There was a verdict and judgment for the plaintiff, from which the defendant appealed.

As the case comes up, no proof of the genuineness of the signature to the note was adduced, either before or after the rejection of the defendant's witnesses: so that we must infer that the parish judge assumed, that the signature was *duly proved*, from the circumstance of the defendant having forborne to make an express admission or denial of his signature, as required by law. *Code of Practice, article 324.*

The counsel for the appellant has urged in argument, that the judgment should be reversed, because if the denegation of having made and executed the note, be a special denial of the signature, the judge erred in rejecting the witnesses, before proof was made of the signature. If such a denegation be not a special denial of the signature, the judge was still in error in rejecting the witnesses. In the first hypothesis, the jury erred in finding a verdict, without proof of the genuineness of the signature.

The penalty which the law denounces by depriving a party of every other means of de-

This court is of opinion, the parish judge erred. The penalty which the law denounces, when a party is deprived of the benefit of his pleas or defence, who expressly denies his own signature, is not in our opinion incurred by the denial

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of his having made and executed the note sued on, and to which his signature appears. This denial may be special, as in the plea of *non est factum* of the common law. After the signing, sealing and delivery are proved, the special plea of *non est factum* is established, by proof of the delivery as an escrow, or by a material alteration, as by the tearing of the seal. After the note is signed it is certainly made, yet it will not avail the payee before the maker parts with it; until then, it is perhaps not executed. After execution, it may cease to be the note of the maker, by any material alteration without his consent.

Although an express denial of *every* allegation be an express denial of *each* one, this court has held, that the plea of the general issue to the plaintiff's demand, founded on a promissory note, does not waive others when found for the plaintiff; that is, an express and special denial of the signature is required, before the party is debarred from every other plea or defence, on proof being made of it by the adverse party. 8 *Martin, N. S.*, 329. 1 *Louisiana Reports*, 486.

In the case cited from 8 *Martin, N. S.*, 329, the effect of the denial of the execution of the note appears to have been argued and considered in its true light, but no decision was made on that point in the case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed; the verdict set aside, and the case remanded for trial, with directions, to allow the defendant to offer testimony in support of all his pleas; the appellee paying costs in this court.

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fence, who expressly denies his signature, and it is proved by his adversary, is not incurred by the denial of his having made and executed the note sued on, to which his signature is attached.

Although an express denial of every allegation is an express denial of each one; yet the plea of the general issue does not waive others, and an express and special denial of the signature is required, before the party is debarred from every other plea, on proof being made of his signature.

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BENOIT  
vs.  
BENOIT'S HEIRS.

BENOIT vs. BENOIT'S HEIRS.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where a common ancestor was owner, in his own right, of a tract of land, before his second marriage, part of which he sold during his second marriage, for two thousand dollars, which was unpaid at the death of his second wife; and in the settlement of the community, it was included in the mass, instead of being reserved as the sole property of the husband, and which was partitioned in the Probate Court, among all the children: Held, that the child of the first marriage, in an action in the District Court, can compel the children of the second, to collate and pay over the difference to which she would be entitled on a legal partition, so as to allow her a share equal to one-half of the separate property of the common ancestor.

The law contemplates perfect equality among co-heirs, and each one is bound to collate the advantages derived from the ancestor to whose succession he is called.

Collation is an incident of the action of partition; but the obligation to collate, cannot be destroyed by the fact that the ancestor had given away every thing, in his life-time, to one of his children, to the exclusion of the others.

An heir who was not a party to the proceedings in the Probate Court, in the settlement of a succession in which she is interested, and her rights compromised, is not bound by them, and may maintain a separate action against her co-heirs, to recover her lost rights.

This is an action by the plaintiff, who is the only daughter of Daniel Benoit, deceased, by his first marriage, against the defendants, who are children of the second marriage, to recover from them the sum of two thousand nine hundred dollars, which she alleges they received over and above their legal share of the estate of the common ancestor, in the settlement of the succession of the wife of the second marriage.

The plaintiff shows that her father, *previous* to his second marriage, was owner of a tract of land in the parish of West Baton Rouge, part of which he sold *during* his second marriage, for two thousand dollars, which was unpaid at the death of the second wife, and was brought into the succession, and partitioned out among the children of the second marriage, by which the plaintiff, who was entitled to one-half of it at the death of her father, was deprived of her share. She claims the value of some other property, in the same situation, and also a slave, which she alleges was fraudulently sold to her half sister.

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April, 1835.

BENOIT

vs.

BENOIT'S HEIRS.

This case has been before this court, on a former appeal, in which the facts are fully stated. *3 Louisiana Reports*, 223.

The plaintiff obtained a judgment for eleven hundred and twenty-five dollars, and rejecting her claim to the slave, which was not proved. The defendants appealed.

*Labauve*, for the plaintiff, insisted that the judgment should be corrected in favor of the plaintiff, so as to allow one-half of the value of the slave; and that it be affirmed in all other respects.

2. Interest, at the rate of ten per cent. on the amount of her claim, should have been allowed from the death of her father; or, at least, five per cent. per annum, from that period. *Louisiana Code*, 1356. *Code of Practice*, 989.

*Davis, contra*, contended that this case properly belonged to the Court of Probates, at least for all the claim except that for the slave. The principal demand grows out of the partition and settlement in the Probate Court, complained of, and is purely a question of collation.

2. This is, in fact, a suit to annul a former judgment of the Probate Court, decreeing to the father of the plaintiff, at the price of estimation, all the property in his possession for four thousand nine hundred and eight dollars. Such a proceeding cannot be had in the District Court; it can only be done before the tribunal whose judgment is sought to be annulled.

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3. The petition states that Irene Benoit, the mother of the defendants, and half sister of the plaintiff by the second marriage, died before their common ancestor or father; and in such a case the present defendants are not bound to collate gifts made to their mother. *Louisiana Code, article 1318.*

Where a common ancestor was owner in his own right, of a tract of land before his second marriage, part of which he sold during his second marriage for two thousand dollars, which was unpaid at the death of his second wife, and in the settlement of the community, it was included in the mass, instead of being reserved as the sole property of the husband, and which was partitioned in the Probate Court among all the children: Held,

4. It is alleged the mother of the defendants took under the partition and settlement of the succession of the wife of the second marriage more than was due, not more than was decreed to her. This partition was made in 1820; the defendants, therefore, oppose to the plaintiff's claim, the prescription of five and ten years. *Louisiana Code, articles 3507, 3508.*

*Bullard, J.*, delivered the opinion of the court.

This case was before the court at the January term, 1832, on a plea to the jurisdiction of the District Court. The opinion then delivered, contains a sufficient statement of the allegations, on the part of the plaintiff. See 3 *Louisiana Reports*, 223. On the subsequent trial upon the merits, judgment was rendered in favor of the plaintiff, for a part of her demand, and the defendants appealed.

It is shown beyond doubt, that Daniel Benoit, the common ancestor of the parties, was owner in his own right, before his second marriage, of a tract of land of about two hundred and fifty-five arpents. During his second marriage, he sold a part of the land, for two thousand dollars, which was unpaid at the death of his second wife, and which in the settlement of the second community, went into the mass, instead of being reserved as the sole property of the husband. On his death the plaintiff would have been entitled to one-half. The child of the second marriage, by these indirect means, certainly received a greater share than she was entitled to. The law contemplates a perfect equality among co-heirs, and each one is bound to collate either really or fictitiously the advantages derived from the ancestor to whose succession he is called.

The law contemplates perfect equality among co-heirs, and each one is bound to collate the advantages

away every thing in his life-time for the benefit of one of his EASTERN DIST.  
children to the exclusion of the others.

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In addition to the plea to the jurisdiction of the District Court, which has already been disposed of, the defendant set up the prescription of five and of ten years. The right of the plaintiff did not attach until her father's death, December 14th, 1825, and this suit was commenced by service of citation on the 15th October, 1830. Independently of other suits, previously brought and dismissed by the court in which they were instituted, it is clear there can be no ground for the plea of prescription, the present suit having been commenced within the five years after the death of Benoit, the father.

It is further urged, that the proceedings of the Probate Court, in relation to the settlement of the second community, must remain obligatory until set aside by direct action. It appears to us a sufficient answer to this objection, that the present plaintiff was a stranger to those proceedings. They were as to her *res inter alios acta*.

The appellee complains of the judgment below, 1st. because the court did not allow her one-half the value of the slave Tom, and 2d. because no interest was allowed her.

We are of opinion, that the evidence in the case did not authorise a judgment for half the value of Tom, and the amount sued for was not liquidated, the plaintiff was not entitled to interest, from judicial demand.

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derived from the  
ancestor to  
whose succession  
he is called.

Collation is an  
incident of the  
action of partici-  
pation; but the ob-  
ligation to col-  
lateral, cannot be  
destroyed by the  
fact that the an-  
cestor had given  
away every  
thing in his life-  
time to one of  
his children to  
the exclusion of  
the others.

An heir who  
was not a party  
to the proceed-  
ings in the Pro-  
bate Court, in  
the settlement of  
a succession in  
which she is in-  
terested, and her  
right compromis-  
ed, is not bound  
by them, and  
may maintain a  
separate action  
against her co-  
heirs to recover  
her lost rights.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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BERNARD'S  
HEIRS  
vs.  
DUROCHER ET AL.

**BERNARD'S HEIRS VS. DUROCHER ET AL.**

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF NEW-ORLEANS.

Where it is admitted by both parties, that certain dispositions and provisions of a will are illegal and afford sufficient grounds to annul it, no other defects or alleged grounds of nullity will be decided on or noticed.

This is an action commenced in the Court of Probates, for the parish and city of New-Orleans, by the heirs at law of the late widow Bernard, to annul and set aside a will found among her papers since her death, and to be recognised as her lawful heirs, entitled to the inheritance of her succession. The will being found, the judge of probates appointed the register of wills to carry it into execution. An attorney to represent absent heirs was also appointed.

The plaintiffs show that they are the nearest collateral relations of the deceased, and as such, entitled to her succession. That the will set up, which deprives them of this inheritance, is illegal, null and void: *first*, because both her and her husband's will, which bear the same date, are contained in one and the same instrument; the husband having died long before the wife. *Second*, because the dispositions in the will contain substitutions: *first*, in favor of the survivor of them; and *second*, in favor of third persons, on the death of the survivor.

The judge of probates gave judgment, annulling the will, and recognising the plaintiffs as entitled to the inheritance. The counsel for the absent heirs appealed.

*Soulé*, for the plaintiffs.

*Pichot*, for the absent heirs.

*Martin J.*, delivered the opinion of the court.

This is an action instituted in the Court of Probates for the parish and city of New-Orleans, to annul and set aside a will. Madame Durocher, wife of Gaspar Durocher, in her own behalf, and that of the other collateral heirs of the late widow Bernard, obtained a judgment contradictorily with the attorney appointed to represent the absent heirs, and the register of wills, named by the court, dative testamentary executor, under a will of the late widow Bernard and her husband, found among the papers of the deceased, which judgment annulled and set aside said will, on the ground, that it was illegal and void; because the same instrument contained the last will and testament of the deceased Madame Bernard and her then husband; *secondly*, because the will contained substitutions in relation to the disposition of the property of both husband and wife.

The facts of the case are not denied; but this court is pressed for a decision, and the expression of an opinion on the first ground of the alleged nullity of the will.

On the second ground, the appellants themselves, admit that, as the same instrument contains the last dispositions of the late husband and wife, in favor of the survivor of them, with a substitution in favor of third persons, on the death of the survivor: it is, in this respect, illegal, and its dispositions and provisions expressly forbidden by law.

In regard to the first ground of nullity, it is urged, that at the date of the will, the dispositions it contains might lawfully be included in the same instrument; that, although the law was different at the time of the death of the testatrix; yet her will, such as it stood and purported to be, was legal; since the death of her husband long before her, left the will, as regards her, the will of but one person; as she had, at his death, inherited her husband's property.

The court has concluded, that as both the appellants and appellees admit the disposition of the property by the will, is a substitution which is now forbidden by law, and ceased to be legal in this country, on the adoption of the Civil Code in 1808, it follows, that the Court of Probates decided correctly

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Where it is admitted by both parties, that certain dispositions and provisions of a will are illegal and afford sufficient grounds to annul it, no other defects or alleged grounds of nullity will be decided or noticed.

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EASTERN DIST. in annulling and setting the will aside, on the ground, that April, 1835. it contained a substitution. This conclusion renders it unnecessary to express an opinion on the first proposition.

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VS.  
URQUHART  
ET AL.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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BEDFORD VS. URQUHART ET AL.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF ORLEANS.

When parties litigating in respect to their several and separate rights to certain property, trace their titles to one common source, neither of them is at liberty to deny the title of their common author or original vendor. So when it is shown by the pleadings or evidence of a cause, that both plaintiff, defendants and warrantors claim under the same title, neither will be permitted to attack it.

So in a petitory action, when the last warrantor cited sets up no title, but pleads a general denial, the plaintiff may show by legal evidence that the former derives his title from the same common source, and is forbidden to attack it.

In a petitory action, the plaintiff is entitled to the use of any legal evidence or means by which he may render valid the title offered in support of his claim.

This is a petitory action, in which the plaintiff claims title to one moiety of a lot of ground in the city of New-Orleans, which is in possession of the defendant Urquhart.

The plaintiff alleges that his mother died in 1809, and at the time of the dissolution of the marriage, his father was the owner, and in possession of the lot in question, which was acquired during the marriage and continuance of the community of acquests and gains, "from Francisco Ramon

Canas, attorney in fact of Martin de la Madrid, by authentic act passed before a notary, the 21st October, 1806, as appears from the copy hereto annexed." The power of attorney did not accompany the act and was not produced. He further alleges, that at his mother's death, he, as sole heir, was entitled to one-half of the property acquired during marriage, but that no inventory or partition of said property was ever made as required by law. That in 1813, his father made a cession of his property to his creditors, including that now claimed, which was sold by the syndics of the creditors, and purchased by Harrod & Ogdens, and an act of sale passed to them before John Lynd, notary public, on the 11th August, 1813. That the defendant, Urquhart, is now in possession by a title unknown, but which he believes to be derived from the vendees of the syndics. That said sale was made in prejudice of his rights (he, plaintiff, being a minor and not represented or party to it) and is null and void as regards him, and he is entitled to recover one-half of said property ; he prays for judgment and partition of the lot claimed.

Urquhart and wife answered, averring that the community between Bedford and wife was insolvent at its dissolution, and its debts still due and unpaid ; that the action is prescribed ; but if maintained, the defendants are entitled to remuneration for valuable improvements made on the disputed premises ; they aver they purchased from Gilly & Prior by public act, dated 11th June, 1819, with all the appurtenances and improvements thereon, together with all the rights and actions possessed by said Gilly & Prior, whom they call in warranty to defend the title, and in case of eviction pray for judgment against them. The heirs and legal representatives of J. B. Gilly, late of the firm of Gilly & Prior, answered, and averred that the said firm purchased the lot in question of Stephen Henderson, by public act dated the 24th August and 24th September, 1814, with the buildings and improvements thereon. They cite Henderson in warranty to defend ; and in case of eviction, pray judgment against him.

Henderson pleaded a general denial, and averred that he purchased the premises from Harrod & Ogdens, by public act,

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dated the 8th March, 1814. That said firm was composed of C. Harrod, Peter V. Ogden, since dead, leaving a son and only heir, residing with his mother, and G. M. Ogden, also dead, but leaving an heir, all residing in New-Orleans ; that Harrod and the heirs of the two Ogdens are bound jointly and severally to defend this suit, and pay such judgment as may be obtained against him, and he calls them in warranty accordingly. The defendants and warrantors as above, annexed the titles under which they held respectively to their answers.

The heir of G. M. Ogden answered, denying any liability ; that she was a minor, and could not accept her father's succession ; that it was insolvent, and she had never received any thing from it.

The heir of P. V. Ogden pleaded a general denial, and denied specially that the plaintiff ever accepted the succession of his ancestor, as alleged by him.

Harrod denied that he sold the property to Henderson, and was not liable in warranty. In answer to the petition, he denied generally all the allegations in it ; and specially, that the plaintiff had any title to the property in question.

The plaintiff offered in evidence, subject to all legal exceptions, the act of sale from the syndics of Bedford to Harrod and Ogdens, of the property claimed, dated the eleventh of August, 1813.

On the trial, the defendant's counsel moved for a non-suit, on the ground that the plaintiff had not shown a sufficient title to enable him to recover, or to put the defendants on proof of theirs, according to the Code of Practice, art. 44.

The plaintiff relied on the sale to his ancestor in 1806, by Canas, attorney in fact of Martin de la Madrid, and the possession of the defendants under the sale from the syndics of Bedford.

The parish judge decided, that as no power of attorney accompanied the sale made by Canas, as attorney in fact of Martin de la Madrid to Bedford, nor was referred to in it, that its existence is not shown ; that until such power be shown, there is no sale proved ; and that, therefore, the plaintiff does

not make out his title in the words of the law; and not doing so, the possessor must be discharged from the demand. *Code of Practice*, 44.

The plaintiff's demand was dismissed, and he appealed.

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*Buchanan and Culbertson*, for the plaintiff.

1. The judgment appealed from is erroneous, inasmuch as the plaintiff showed a good title to the property described in the petition.
2. The claim of the appellant to his mother's portion of said property has never been legally divested.
3. The court below erred in requiring the production of the procuration from Martin de la Madrid to Canas.
4. The evidence introduced, shows that the defendants hold the property, by virtue of the same title exhibited by the plaintiff.
5. Supposing that the production of the procuration from Madrid to Canas would be necessary under certain circumstances, the defendants, in this action, who possess under the same title, cannot attack the plaintiff's title for want of such production.

*Eustis, Rost and Strawbridge* for the defendants and warrantors.

1. This is a petitory action, and the plaintiff must make out a good and complete title before the defendants can be compelled to exhibit theirs, or be put on the proof of it. They have a right, in the meantime, to avail themselves of any defects in the plaintiff's title. 8 *Martin, N. S.*, 105.
2. In petitory actions, or action for the revendication of property, the plaintiff must make out a complete title, or the defendant, *whoever he is*, will be discharged. He must show title and make it out satisfactorily in all points, to entitle him to recover. *Code of Practice* 44. 9 *Martin*, 267. 10 *Ibid.*, 293.
3. The plaintiff's title is defective, because no power of attorney is shown, referred to, or accompanies the sale from Canas, as attorney in fact of De la Madrid to Bedford,

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EASTERN DIST. Proof of agency in the sale of immoveables and slaves, must  
April, 1835. be of as high and authentic a character as the sale and  

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BEDFORD title itself. The procuration or power of attorney, must be  
vs.  
URQUHART in writing, and authentic, and produced in evidence. 4  
ET AL. Martin, 564. 2 *Louisiana Reports*, 597. 3 *Ibid.*, 459.

*Magnon* and *Fourchy*, for plaintiff, in reply, contended, that the defendants could not rely on possession and compel the plaintiff alone to show title; but that title was pleaded and the decision of the case depended on the respective titles of the parties.

2. The plaintiff has a right to show the defendant's claim under the same title with himself, and cannot attack it.

*Mathews, J.*, delivered the opinion of the court.

This is a petitory action, on which the plaintiff claims, as heir of his mother, a certain lot of ground in the city of New-Orleans, which he alleges to be in possession of the defendants. They, after pleading the general issue, insolvency of the father of the plaintiff and prescription, cited in warranty the heirs and representatives of Gilly & Prior, their vendors, who after various pleas, cited S. Henderson (under whose title their ancestors held) in warranty, who called on C. Harrod and the heirs and representatives of G. M. Ogden and P. V. Ogden to warrant and defend the title which he had obtained from the firm of Harrod & Ogdens. On behalf of the heirs of the Ogdens, special answers were made, denying that they ever inherited any property from their fathers, and Harrod's answer contains nothing more than a general denial of all facts alleged against him by the plaintiff. Under these pleadings and certain evidence, as shown by the record, the cause was submitted to the court below, which ordered and decreed that the plaintiff's demand should be dismissed with costs. From this judgment, he appealed.

Being a petitory action, the court below assumed as a legal principle, that the plaintiff was bound to make out his title, before the possessor could be disturbed or required to show any, or in the language of the forty-fourth article of the *Code*

of Practice, that the possessor should be discharged from the demand. This principle, as assumed, is strictly correct. But to justify the judgment of that court in the present instance, it must clearly appear that the evidences of title, adduced on the part of the claimant, show no right to the property in him. He claims as heir to the succession of his mother, and alleges that the lot in dispute, made a part of the matrimonial community existing between his parents at her death, as having been acquired during their marriage. The main document of title offered by the plaintiff is a notarial act of sale passed before P. Pedesclaux, on the 21st October, 1806. This deed purports to be a conveyance of the property in question to the father of the plaintiff, by one Martin de la Madrid, through the agency of a certain Francisco Ramon Canas. The act of procurement was not adduced, nor its absence accounted for, and on these grounds the deed was rejected by the court below, as affording no evidence of title in the ancestor of the claimant. Whether any other persons except those pretending title, immediately derived from Madrid, would be legally authorised to dispute the authority assumed by Canas, is a question, which, according to the view we have taken of the case, need not be solved.

The doctrine is now well settled, that when parties litigating in relation to their respective rights to any specified property, trace their titles to one common source, neither of them is at liberty to deny the title of their common author. In support of this, see 11 *Martin*, 714. 1 *N. S.* 577. 4 *N. S.* 402, and 2 *Louisiana Reports*, 209 to 213. The last of these cases establishes the principle, that when the fact is shown either by the pleadings or evidence of a cause, that both parties claim under the same title, neither will be permitted to attack it.

In the present case the defendants plead title and call in their warrantors to defend, &c. The ascent of titles is traced by calls in warranty, up to Harrod and Ogdens. The answer of these parties who were last cited, sets up no title as derived from any person. The question arising from this part of the cause requires a decision by which it is to be

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When parties litigating in respect to their several and separate rights to certain property, trace their titles to one common source, neither of them is at liberty to deny the title of their common author, or original vendor.

So, when it is shown by the pleadings or evidence of a cause, that both plaintiff, defendants and warrantors claim under the same title, neither will be permitted to attack it.

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So, in a petitory action, when the last warrantor cited, sets up no title, but pleads a general denial, the plaintiff may show by legal evidence, that the former derives his title from the same common source, and is forbidden to attack it.

In a petitory action, the plaintiff is entitled to the use of any legal evidence or means by which he may render valid the title offered in support of his claim.

ascertained whether the plaintiff may legally introduce competent evidence to show that the last defendants derived their title from a common source with him, in other words, whether he is authorised to prove in support of his claim, that they did obtain title to the property in dispute, from his father under whose title he claims.

This question we think must be answered in the affirmative. We know of no principle of law or rule of evidence which deprives a plaintiff in a petitory action from the use of any legal means by which he may render valid the title offered in support of his claim.

The pleadings carry up the titles of the defendants to Harrod & Ogdens. Whence did they derive their title? they are silent on this subject, but to give validity to that set up, on the part of the plaintiff, it became necessary for him to establish the fact, that they derived title from the same source from which his decends. This he has done by adducing a record of the proceedings in his father's insolvency, and a notarial act of sale, made by the syndics of that estate, to the defendants Harrod & Ogdens. We are of opinion, the court below erred in dismissing the claim of the plaintiff, &c.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be avoided, reversed and annulled, that the suit be reinstated and remanded for a new trial, to be proceeded in according to law, with instructions to the judge *a quo*, not to permit the defendants to dispute the title offered by the plaintiff, unless they show titles derived from a source different from that under which he claims. The appellees to pay the costs of this appeal.

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ON AN APPLICATION FOR A RE-HEARING.

In a petitory action, it is not necessary that the plaintiff should show title in himself, good against the whole world, and perfect, in order to recover against a naked possessor.

The plaintiff in the petitory action, is bound to produce a title as owner *causa idonea ad transferendum dominium*, to repel the presumption of ownership resulting from mere possession; and the date of his title ought to be anterior to the possession of the defendant.

As a general rule, an action of revendication can only be maintained by the owner; yet it may sometimes be maintained by one who is not the real owner, but was in the way of becoming so when he lost the possession.

So, he who was in possession in good faith, in virtue of a just title, and lost the possession before the period required for prescription, can recover it in a petitory action, from one who is in possession without title.

In a petitory action, the presumption of ownership resulting from mere possession, will be repelled by exhibiting such a title, on the part of the plaintiff, as would have formed the basis of the ten years' prescription, if the possession under it had continued, together with evidence of possession, in virtue of such title, anterior to the commencement of the defendant's possession, and would otherwise authorise a judgment, restoring him to possession as owner.

A sale of immoveable property, followed by tradition by a person styling himself the attorney in fact of the owner, but whose power of attorney is not produced, is only defective for want of the evidence of his authority, and not a nullity of form resulting from his legal incapacity. If he had stated himself to be the tutor or curator of the owner, the sale would be null for defect of form, as the purchaser would be considered as having purchased in bad faith, from a person legally incapable of selling.

So, where the purchaser was in possession for more than twenty years, under a conveyance executed by a person styling himself attorney in fact, without evidence of the agency, it was held that this furnished a legal presumption of the agency.

## CASES IN THE SUPREME COURT

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So, where the plaintiff alleges certain property was conveyed to a person called in warranty, who, in his answer, denies it, the former has a right to produce in evidence, the act of sale to the latter, in support of his allegation.

A warrantor has a right to plead every exception in defending the cause which the defendant himself might have pleaded; but it does not follow, that if the original defendant has set up a particular title, by which he made an important admission, the warrantor or the court can disregard it.

This case comes before the court on an application for a re-hearing. See the decision *ante*, 234.

*Strawbridge, Eustis and Rost*, for the defendants and warrantors, applied for a re-hearing, on the following grounds :

1. The court erred in supposing "Harrod's answer contains nothing more than a general denial of all facts alleged against him." This is an error of fact, as the answer expressly denies the plaintiff had any title; which, put him on the proof of it, and failing, his suit was dismissed.
2. Has the plaintiff made out a good title? we deny it. He seeks to recover, not by making out a good title in himself, but by showing a bad one in us. This he cannot do. The law says, "the plaintiff, in an action of revendication, must make out his title, otherwise the possessor, whoever he may be, shall be discharged." *Code of Practice, art. 44.*
3. Harrod, the last person called in warranty, has shown no title. We hold it to be the law, that the defendant is bound to show no title, until the plaintiff produces one apparently good, which we deny he has done in this case.
4. It is a general principle, never doubted, that the defendant had a right to rest on his possession, until the plaintiff shows a good title.
5. This court has declared, that "persons claiming the estate, are bound to make good their title against the legal possessor; and, in opposition, the latter has a right to prove, by legal means, any title which may defeat the claim of the

plaintiff. *White vs. Holstein*, 4 *Martin*, 474. This is the principle of the common law, that a defendant in ejectment might set up an outstanding title, in a third person; this we understand to be the spirit of the 44th *article of the Code of Practice*; for, if it is shown that a third person is the real owner, it is clear the plaintiff has not made out a good title. Here the plaintiff himself has shown an outstanding title in *Martin de la Madrid*. See also, case of *Sassman and wife vs. Aymé*, 9 *Martin*, 267.

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6. Thus the doctrine was settled before the *Code of Practice*. When the jurisconsults reported the *projet* of the 44th *article of the Code of Practice*, they referred to the *old Civil Code*, p. 478 art. 24, which says, "either honest or knavish possessors, who have possessed one year, ought to be maintained in their possession until they who trouble them, clearly prove their rights; and if a demand against a possessor is not grounded on *good and sufficient titles*, it is enough to *allege possession, without producing any other defence*." This is the true interpretation of the 44th article.

It remains to examine plaintiff's authorities which we say do not support the position assumed.

Referring to 11 *Martin*, 714, we find nothing in relation to this point. In the case of *Crane vs. Marshall*, 1 *Martin*, N. S., 577, the defendant *pleaded title under the will by which plaintiffs claimed*.

What the defendant pleaded in Verrett's case, 4 *Martin*, N. S., 402, does not appear; nor does it appear that the plaintiffs were permitted to make out a title for defendant; but if it did, the suit was not one "in revendication of property," but a pursuit by a mortgagee for his debt.

In Trahan's case, 2 *Louisiana Reports*, 210, it is expressly shown that defendant pleaded title in Brashears, under whom plaintiff claimed, and gave in evidence the sheriff's deed for the land, and the intermediate conveyances to himself. To correct the expressions of the court, in such a case, viz: that it was "immaterial whether the pleadings showed the fact, provided the evidence did," into an authority to show that a plaintiff might make out defendant's title, and that if that

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EASTERN DIST. title led to a common source, defendant must be bound in the  
*April, 1835.* most extraordinary logic we have lately heard.

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When a party pleads title, or as the court says, it is the same thing, gives it in evidence, he cannot impeach it. Why? That is the question which solves the difficulty. And why? Because no man is permitted to blow hot and cold: he cannot plead a title, or offer a title in evidence, and then nullify what he has done. He cannot produce a witness, and then show that witness unworthy of credit; because the acts are inconsistent and contradictory.

Does it follow, that he cannot gainsay the plea, or the proof of his adversary. The suit exists because they cannot agree. Now, may it please the court to show that Harrod cannot attack the plaintiff's title, it must appear that Harrod, either by the pleadings or by the evidence offered, (we agree it is immaterial which) has placed himself in a situation where it would be inconsistent in him to do so; and that all the other defendants have done so likewise. Let this be done, and we abandon the cause.

If it cannot, this cause must stand in our reports at war with Sassman's case. It is no longer the law, that "when the defendant pleads the general issue alone, and does not set up title, the plaintiff cannot be relieved from the necessity of proving *a legal title in himself*, by showing that the defendant, too, has a defective title, emanating from the same source." How can the court know that this is the only title by which the defendant holds the premises.

Harrod, at least, has pleaded the general issue, the court says so, in their decree: he has set up no title, and yet Bedford has been relieved from the necessity of proving a legal title in himself, by showing that the defendant has a defective title, emanating from the same source. If the two decisions can be reconciled, if the latter be not an innovation on our jurisprudence, again we say we will abandon the cause.

*Bullard, J.*, delivered the opinion of the court.

Since the argument in this case, on the re-hearing, we have holden it under advisement an unusual length of time, and

have considered it with all that attention and deliberation called for by the intrinsic difficulty of the questions to be settled, and the earnestness and ability with which our former judgment has been combated. Having no interests but those of truth, no aim but justice, according to law, we are disposed to take up the case without reference to the opinion first pronounced.

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At the threshhold of this inquiry, we meet the question, whether the 44th article of the Code of Practice has introduced a new principle in relation to the petitory action, or whether it merely reasserts the well known maxim, "that the plaintiff must recover by the strength of his own title, and not by the weakness of his adversary's." "The plaintiff," says the Code, "in an action of revendication, must *make out his title*, otherwise, the possessor, whoever he be, shall be discharged from the demand."

Pothier, in treating on this kind of action, adopts the rule, that the plaintiff in revendication, in order to succeed in his demand, must base it on some title of property ; and such titles are said to be those, which are of a nature to transfer from one to another the ownership of the thing "*causæ idonæ ad transferendum dominium*." Among titles of that description, he enumerates an act of partition, by which it should appear that the thing sued for, fell to the share of the plaintiff in the succession of some of his relations. "When the possessor," says he, "against whom the suit is brought, proves that his possession was anterior to the title which I produce, although he produces none on his part, the title which I exhibit, is not alone sufficient, unless I produce another more ancient, which shows that he who by his contract, which I produce, sold or gave me the property, was really the owner ; for I cannot make myself a title by procuring a sale or donation of a property which you possess, from a person who does not possess it ; you, as possessor, are presumed to be the owner, rather than he who sold it to me, and who did not possess it, and of whose right I can prove nothing. But when the title which the plaintiff exhibits, is anterior to the possession of him against whom

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In a petitory action, it is not necessary that the plaintiff should show title in good faith, having had reason to believe that he who sold in himself, good or gave it to me, and of which I saw him possessed, was the owner, that title alone would suffice against a possessor who recovers against a naked possessor.

*Pothier, Dom. de Pro., 323.*

The plaintiff in the petitory action, is bound to produce a title as owner *causa idonea ad transferendum dominium* to repel the presumption of ownership resulting from mere possession; and the date of his title ought to be anterior to the possession of the defendant.

We have also the authority of Pothier, for assuming as a principle, that although regularly the action of revendication

can be maintained only by the owner, it may sometimes be maintained by one who is not the real owner, but was in the way of becoming so, when he lost the possession. For he who was in possession in good faith, in virtue of a just title, and lost the possession before the period required for prescription, can recover it in a petitory action, from one who was in the way of becoming so when he lost the possession.

*"Il n'est pas précisément nécessaire que le titre en vertu duquel j'ai possédé la chose fut un titre valable, il suffit que j'ait eu quelque sujet de le croire valable*

*So, he who pour que je suis réputé avoir été juste possesseur de la chose, et was in possession, in good faith, in virtue of a just title and lost the possession before the period required to be declared owner of one undivided half of the lot in dispute. He alleges that he is the sole heir of his mother,*

*Same, No. 292, 293.*

Let us now examine under what title the plaintiff seeks

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that the property in dispute was possessed by his father and mother, in community, by virtue of a sale from Canas, attorney in fact of Martin de la Madrid, that on the death of his mother, his title in one undivided half vested; that his father remained in possession for some years, and finally surrendered the whole to his creditors, by whose syndics it was sold, that Harrod & Ogdens became the purchasers and that a part of it is now in possession of the defendant Urquhart, by a title unknown to the plaintiff, but which he believes to be derived from the vendees of the syndics.

The immediate title of the plaintiff here set up is heirship, *pro herede*, a transmission to him of his mother's right by hereditary succession. The fact that the property was possessed during the existence of the community, that it was in the actual possession of Bedford, in virtue of the sale from Canas, at the time his wife died, and up to the period of his surrender, is beyond doubt. Whatever rights the wife had, vested in her heir at her death, and from that time, the possession of the husband must be considered as the possession of the heir, then a minor under the age of puberty. Leaving out of view for the present, the deed from Canas to Bedford, the next ascending link in the title, we come to examine the question whether the title *pro herede* alone, is sufficient to enable the heir to recover against a naked possessor. Considering the defendant in possession, without allegation of title, and relying on mere possession, how far does the plaintiff entitle himself to recover by proving his heirship and his possession as heir, anterior to the commencement of the possession of the defendant.

We think it a sound principle, that the presumption of ownership resulting from mere possession, will be repelled by exhibiting such a title on the part of the plaintiff, as would have formed the basis of the ten years' prescription, if the possession under it had continued, together with evidence of possession, in virtue of such title, anterior to the commencement of the defendant's possession, and would authorise a judgment restoring him to possession as owner.

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a petitory action,  
from one who is  
in possession  
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In a petitory action, the presumption of ownership resulting from mere possession will be repelled by exhibiting such a title on the part of the plaintiff, as would have formed the basis of the ten years' prescription, if the possession under it had continued, together with evidence of possession, in virtue of such title, anterior to the commencement of the defendant's possession, and would authorise a judgment restoring him to possession as owner.

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Let us consider then, the plaintiff as in possession, and relying in an action against him, on the prescription of ten years under his title. The mere title *pro herede*, would perhaps not be sufficient, for he derives from his ancestor only such title as she had, together with the right of continuing in possession, until prescription is acquired under the primitive title of the ancestors. The conveyance from Canas coupled with his heirship, would constitute the basis of his prescription.

A sale of immoveable property, followed by tradition, by a person styling himself the attorney in fact of the owner, but whose power of attorney is not produced, is only defective for want of the evidence of his authority and not a nullity of form resulting from his legal incapacity. If he had styled himself to be the tutor or curator of the owner, the sale would be null for defect of form, as the purchaser would be considered as having purchased in bad faith from a person legally incapable of selling. The tradition of the thing in pursuance of the sale, certainly furnishes some presumption of authority, and the purchaser may well have supposed that he was buying from a person authorised to sell, and may be regarded as holding *unimo domini*, and in good faith, "*La bonne foi en matière de prescription, consiste dans l'ignorance du droit d'autrui sur ce qu'on possède. Bonae fidei emptor esse videtur, qui ignoravit rem alienam esse aut putavit eum qui vendidit jus vendendi habere.*" *Merlin Rep. verbo prescription.*

So where the purchaser was in possession for more than twenty years under a conveyance executed by a person styling himself attorney in fact, without evidence of the agency, furnished a legal presumption of the agency. In that case the power was by act *sous sing privé*, but not proved. It was, therefore, no better unaccompanied by tradition and long possession, than if it had never existed, and the evidence of agency had depended altogether on the assumption of that quality, by the vendor,

strengthened by long possession under the deed. 6 *Martin*, EASTER'S DIST.  
*N. S.*, 153.

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In the case now before the court, nearly thirty years have elapsed since the execution of the conveyance by Canas, and the only persons interested, in contesting his authority, to wit: De la Madrid or his heirs, have acquiesced, notwithstanding the open and public possession of Bedford, before his surrender, and for aught that appears to the court, of those who succeeded him. If the present plaintiff were defendant in a petitory action, it is the opinion of this court, the title now set up by him, would form a sufficient basis of prescriptive right. It is asserted by the counsel for the appellees, that the decree heretofore pronounced, is an innovation on the jurisprudence of the state, and several cases are cited to prove it. The first is that of *White et al. vs. Holston et al.* 4 *Martin*, 474, in which the court said that "the persons claiming the estate, were bound to make good their title, against the legal possessor, and in opposition the latter has a right to set up and prove by legal means, any title which may defeat the claim of the plaintiffs." It appears that the plaintiffs claimed an estate as forced heirs; the defendant in possession set up a title, distinct from the will, which it was the principal object of the suit to annul as inofficious. An objection was made to the introduction of evidence, to prove any other title than that derived under the will, because the defendant had accepted the estate, agreeably to an inventory made by competent authority. But the court said the defendant had set up a title distinct from the will and had a right to do so, "but if it did appear clearly," says the court, "that Mrs. Holston has accepted the property as an inheritance from D. White, we are of opinion she ought to be estopped from pleading or proving any title in herself, distinct from or independant of his testament." Here the general principle is recognised, which is not denied, that the defendant has a right to show title derived from any source, unless estopped by setting up a particular title in the answer.

The case of *Sassman and wife vs. Aymé*, 9 *Martin*, 267, is next urged as settling a contrary doctrine.

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In that case, the plaintiff claimed property as heir of her deceased father, and the general issue was pleaded, the defendant relying on possession alone. The document produced by the plaintiff in support of her title proved, that her father was, for aught that appeared, still alive. Nor did she prove any possession in herself, under the pretended partition. Here then she showed an utter want of title in herself, as alleged by her, and denied by the defendant. There was in the record a copy of a sale, by which it would appear that the defendants had acquired title, under the same provisional distribution of the estate of the absent father. It was doubtful who introduced it in evidence. The court presumes from some circumstances, that it was introduced by the plaintiff, in support of her defective title, and then uses the expression, quoted with great emphasis, by the counsel for the appellees, "Taking this for granted, we are of opinion, that in a case like this, where the defendant pleads the general issue alone, and does not set up title, the plaintiff cannot be relieved from the necessity of proving a legal title in herself, by showing that the defendant has a defective one, which emanates from the same source. How can the court tell that this is the only title by which the defendants hold the premises."

The two cases differ very widely. In Sassman's case, the plaintiff claimed as heir of her father, and it turned out on the evidence offered by herself, that she was not an heir; that her father, an absentee, was legally presumed to be still alive. In the present case, the plaintiff alleges heirship and proves it; he proves possession under the sale from Canas, both before and after the death of his mother. In the former, the plaintiff relied on the naked title *pro herede*, without pretending to show how her father acquired the property; in the present, he shows a sale, by a person assuming to act as attorney in fact, accompanied by tradition, and followed by long possession.

But the appellees contend, that they show an outstanding title in De la Madrid, as they have a right to do. In doing so, they assume the right to question the act of his real or

assumed agent, whom he has not thought proper to question himself, for nearly thirty years. Such a nullity appears to us, relative and not absolute.

Thus far we have examined the case independently of the answers of the original defendant, and of the several warrantors, previous to Harrod & Ogdens, and of the evidence in record, tending to show that Harrod & Ogdens purchased from the syndics of Bedford, and that by sundry conveyances the property came into the possession of Urquhart. The admissibility of this evidence is questioned, and it was rendered subject to all legal exceptions.

Each defendant successively annexes to his answer, calling in his warrantor, a copy of the conveyance by which he acquired title in the premises, until we come to the last, Charles Harrod, one of the firm of Harrod & Ogdens, who denies both his sale and obligations, as warrantor, and the title of the plaintiff, and all the facts alleged by him. These different conveyances, appear to have been read in evidence, without objection, except the one from the syndics of Bedford to Harrod & Ogdens.

In inquiring into the legal admissibility of this document, it must not be overlooked, that the plaintiff expressly alleges, that the syndics conveyed the property to Harrod & Ogdens, and this fact is denied by the answer of Harrod. It cannot be denied, that as a general rule, whatever is alleged and denied, may be proved by legal evidence. The effect of the evidence is another question. A sale, purporting to be to a commercial firm, and accepted only by one partner, may not, in itself, be proof against the partner, who did not except, but it tends to prove it, and evidence that the other partner accepted and acquiesced in it afterwards, may make full proof of the fact. Harrod, in effect, disclaims having acquired any title under that deed, or having conveyed any, or incurred any responsibility, by the subsequent sale, by his partner, in which he did not concur. Under the pleadings in this case, we think the document admissible, in support of the plaintiff's allegation.

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A warrantor has a right to plead every exception in defending the cause which the defendant himself might have pleaded; but it does not follow, that if the original defendant has set up a particular title, by which he made an important admission, the warrantor or the court can disregard it.

The warrantor, by the Code, has a right to plead every exception in defending the cause, which the defendant himself, might have pleaded; but it does not follow as a necessary consequence, that if the original defendant has set up a particular title, and thereby made an important admission, the warrantor can disregard it, or that it is to be disregarded by the court. There is no privity in this case, between the last warrantor and the original defendant, nor between the plaintiff and the last warrantor. The plaintiff can recover only of the original defendant, and he of his immediate warrantor, and so on, in succession, as they are called in. The plaintiff may certainly strengthen his title, by the admissions of his adversary, if it appears by those admissions, that they both derive title from a common source. It was said, in the argument, that we cannot inflict a title on the defendant. Undoubtedly not, but if he has chosen to adopt and set up one, on which he relies against his warrantor, he cannot afterwards repudiate it, on discovering that it is better to have no title than a bad one. The sale from Gilly & Pryor to the defendant Urquhart, recites that they acquired the property from Stephen Henderson; the latter called in warranty, sets up title under Harrod & Ogdens, in virtue of an act of sale, which accompanies his answer, signed only by G. M. Ogden, in behalf of the firm. In that deed it is recited that the property is the same purchased by them of the syndics of Bedford. This recital in the deed, is evidence at least against Ogden, whose heir is a party, if not against Harrod, that the property was acquired from Bedford. All these acts of sale, were in evidence and produced, as it appears, by the defendants themselves. Independently of the deed from the syndics to Harrod & Ogdens, they show that the defendant set up a title, which is traced back to Bedford's estate.

Not only does the defendant allege title, as derived through Gilly & Pryor, but he alleges the insolvency of the community of Bedford and wife, and that the debts are still due and unpaid, and claims for the value of the improvements made by him.

Upon the whole, after the most deliberate attention, we have been able to bestow on this case, we are not satisfied, that the judgment first pronounced, was erroneous, and it must remain undisturbed.

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WEST'S SYNDIC vs. CARLETON AND LOCKETT.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The statutes of 1809 and 1826, authorising summary proceedings against counsellors and attorneys at law, who refuse to pay over money collected by them for clients, do not entitle them to the intervention of a jury.

Attorneys at law, collecting money due to an insolvent estate, cannot retain their fee, but are required to pay the money over to the syndic, and have their claim for fees placed on the tableau, and its payment ordered in the general distribution.

The plaintiff took a rule on the defendants, to show cause why they should not pay over the amount of a judgment which they had collected, and was due to the estate he administered as syndic, they having refused to do so, on application made to them.

The defendants denied that they were liable to be proceeded against in this summary way, but could only be sued in the ordinary form; they further state they have a legal claim in compensation of the demand brought against them; and that they have never refused, but offered to settle fairly with the plaintiff, who refused to join them.

In their answer to the rule, the defendants annex an account for professional services rendered the plaintiff, which overruns the amount of moneys collected by them and not paid over. They plead this account, in compensation and reconvention, and pray that the cause be tried by a jury.

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On hearing the rule it was made absolute, and the defendants ordered to pay over the money in their hands to the plaintiff. They appealed.

*J. Slidell*, for the plaintiff.

1. An attorney at law has no lien or privilege upon moneys collected. No such privilege is conferred by the Code, and none exist but those which are expressly permitted by it. *Louisiana Code, art. 3152.*

2. No payment can be made by a syndic, or other disposition made by him of the funds of the estate, but upon his filing a tableau of distribution, and its homologation after legal notice to the creditors. 2 *Martin, N. S.*, 157. 4 *Ibid.*, 633. 7 *Ibid.*, 157. 1 *Louisiana Reports*, 172.

*Carleton and Lockett, in propriâ personâ, contra.*

*Mathews, J.*, delivered the opinion of the court.

This suit commenced by a rule on the defendants to show cause why they should not pay over to the plaintiff certain sums of money which they had collected for him, as attorneys and counsellors at law, and the rule was made absolute, from which the defendants appealed.

They excepted to the legality of the summary proceeding as adopted by the plaintiff, and finally claimed to have the cause tried by a jury. Their exception and claim for a jury was overruled by the court below, and judgment on hearing the case, was rendered as above stated.

The statutes of 1809 and 1826, authorising summary proceedings against counsellors and attorneys who refuse to pay over money received by them for clients; one passed in 1809, and the other in 1826. Taken together, they certainly authorise judgments, to be rendered in the cases provided for in summary proceedings by motion.

The defendants come within the purview of these statutes, and it appears to us, that parties who are by law subjected to summary proceedings by motion, to a court, are not entitled to claim a jury: this would be to introduce delays

not tolerated by laws which require prompt proceedings. We are, therefore, of opinion that the judge *a quo* did not err in overruling the exception and claim for a jury, made by the defendants.

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On the merits, the present case does not require of us to settle the question, whether an attorney may legally retain out of money by him collected, any portion of the same, which, in his judgment, he considers a just compensation for his services.

The plaintiff claims as syndic administering his estate for the benefit of his creditors; he is bound to collect all sums due to it, and cannot legally pay any creditor without a tableau of distribution, duly homologated. If the defendants are creditors by privilege or otherwise, they must submit their claims to orders for general distribution, &c.

Attorneys at law, collecting money due to an insolvent estate, cannot retain their fee, but are required to pay the money over to the syndic, and have their claim for fees placed on the tableau and its payment ordered in the general distribution.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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#### RICHARDSON vs. GURNEY.

##### APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

An execution cannot be quashed and set aside, on the return of the sheriff that the defendant has deposited the money in his hands, conditionally, to await the decision on an attachment of the debt, by the debtor himself, in a suit against the plaintiff in execution.

Where a party obtains a judgment on a rule, in which he has mistaken his remedy, the judgment will be reversed, and the rule discharged, at his costs in both courts.

The plaintiff obtained a judgment against the defendant for four hundred and ninety-six dollars, with interest and costs. Execution was issued thereon; on which the sheriff

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returned that the defendant had deposited in his hands five hundred and eleven dollars, conditioned to await the decision of the court with respect to an attachment suit, in which he, the defendant, had attached his own debt in a suit against Richardson, the plaintiff in execution. The defendant in execution took a rule on the plaintiff and the sheriff, to show cause why the execution should not be quashed and set aside, on the ground that the debt and judgment had been seized under an attachment at the suit of the defendant against the plaintiff, for the sum of four thousand five hundred and sixty dollars.

On hearing the parties, the judge made the rule absolute, and set aside the execution. Richardson, the plaintiff in execution, appealed.

*M'Henry* for the appellant.

*Maybin, contra.*

*Martin, J.*, delivered the opinion of the court.

An execution cannot be quashed and set aside, on the return of the sheriff, that the defendant has deposited the money in his hands, conditionally, to await the decision on an attachment of the debt, by the debtor himself in a suit against the plaintiff in execution.

On this return being made, Gurney obtained a rule on Richardson, to show cause why the execution should not be quashed and set aside. The rule was afterwards made absolute, and the execution quashed accordingly. Richardson appealed.

Where a party obtains a judgment on a rule, in which he has mistaken his remedy, the judgment will be reversed and the rule discharged at his costs in both courts.

It appears to this court that the execution ought not to have been quashed. It had been regularly issued. The contest between the same parties, but reversing their order, related to the regularity of the attachment. The question might have been settled by Gurney calling on the sheriff to return the attachment as duly executed; or by Richardson

ing of that officer to pay him the money received on the execution. This would have brought the matter on which parties were at issue, fairly before the court. In this case, we think the appellee overlooked his remedy, and the court erred in quashing the execution.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that the rule be discharged, with costs in both courts.

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BANK OF LOUISIANA VS. STANSBURY ET AL.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where the wife makes opposition and procures an injunction against proceedings in the *via executiva*, on the ground that she has a prior claim and mortgage to the property seized, and the seizing creditor answers and denies her claim and mortgage, and avers she has made herself liable for his claim, by intermeddling in her husband's succession: *Held*, that the demand set up in the answer was reconventional, and not a proceeding in the ordinary way, as distinguished from the summary, and the court did not err in proceeding to inquire into the personal liability of the wife, to pay the debt.

Banks cannot, in any case, take more interest than at the rate fixed by their charters. Where the bank charter fixes the rate of interest at nine per cent., and ten is agreed upon, it will be reduced to the rate affixed by the charter.

This case commenced by the executory process. The Bank of Louisiana obtained an order of seizure and sale, in August, 1832, against a plantation and slaves in the parish of Ascension, which W. S. Stansbury had mortgaged to secure a loan of eight thousand dollars, with interest at the rate of ten per cent. per annum, from the 10th of April, 1830, when said loan became due and payable.

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Stansbury being dead, his widow made opposition to the executory proceedings, and obtained an injunction, claiming the property as her own. She alleges she intermarried with W. S. Stansbury, in Maryland, in 1819, and came to this state with him to reside; that her husband, at different times had received money and funds of her to the amount of ten or twelve thousand dollars, which he invested in slaves and in part payment of the plantation under seizure. She claims a higher privilege and mortgage than the bank, and prays to be allowed to keep the property in question, which she alleges was adjudicated to her by the Court of Probates; she alleges also, that the bank claims illegal interest in demanding ten per cent.

The attorney for the bank replied that she was liable personally, for the community debts of her husband, having applied to the Court of Probates and accepted the community of acquests and gains, and had the community property adjudicated to her; and also that she had become personally liable for the claim of the bank, by taking an active concern in, and disposing of part of the property of the community. It is further averred, that none of the grounds alleged, authorise the issuing the injunction, as it is not stated what portion of the plantation, or what particular slaves, of those seized, were the property of Mrs. Stansbury, or purchased with her money.

On hearing the case, the district judge was of opinion the plaintiff in injunction failed to make out her case, and that, by the acceptancee of the community, which was fully proved, she made herself liable for its debts. Judgment was rendered, dissolving the injunction, and directing the sheriff to proceed with the seizure and sale of the mortgaged property, and that the bank be allowed ten per cent. interest. The plaintiff in the injunction appealed.

*Ilsey, for the appellant.*

1. The order of seizure and sale improperly and illegally issued, as Stansbury, the debtor was dead; the property had been adjudicated by the Court of Probates to his widow, and

there was, in fact, no defendant to proceed against. The widow Stansbury, who was in possession, was not made a party. *Code of Practice*, 98, 99, 100.

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2. Executory proceedings, as well as in the hypothecary action, must be against the third possessor of the mortgaged property. *Code of Practice*, 68.

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3. If the injunction be considered as a branch of the original suit, then, in this case, there has been no change from the *via executiva* to the *via ordinaria*, to justify the judgment which has been rendered. It must, therefore, be annulled and set aside.

*Peirce*, for the bank and defendant in injunction.

1. The plaintiff in this injunction has shown no claim whatever upon her husband's estate, for paraphernal effects or otherwise.

2. If she had, it would not authorise an injunction except as to land and slaves brought by her into marriage; and of this there is no proof, or if there be, there is no evidence that such land or slaves were seized in this suit.

3. If she had, and under circumstances that would otherwise authorise an injunction, yet, in this case, she is debarred; because she has accepted the community, had the property adjudicated to her, sold a large part of it, and consequently made herself responsible if the estate be insolvent, for all the debts of her husband.

4. If the estate is able to pay all its debts, which appears by the inventory, the property adjudicated to her, and which is that seized, is liable for the husband's debts, independent of her personal obligation.

*Carleton and Lockett*, for appellant, in reply.

1. This case is not changed from the *via executiva*, and any irregularities in the executorial proceedings may be inquired into. The law requires three days' notice previous to seizure, which was not given here. *Code of Practice*, 735.

6 *Louisiana Reports*.

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2. There is no evidence in the record to show that the mortgage in favor of the bank was ever recorded so as to affect third persons. *7 Martin, N. S., 577.*

3. These irregularities are sufficient to annul the judgment. It is never too late to take notice or avail one's self of any irregularities in the proceedings in the court below. *5 Martin, N. S., 340, 341.*

*Bullard, J.*, delivered the opinion of the court.

The Bank of Louisiana having procured an order of seizure and sale upon a mortgage executed by Stansbury, his widow, the present appellant, obtained an injunction, on the allegations that she intermarried with said Stansbury in Maryland in 1819, with a view of future residence in Louisiana, where her husband had his domicil at the time ; that her husband received at that time and others, her property to the amount of ten or twelve thousand dollars, for which by the laws of this state she has a legal mortgage, which sum was invested in the purchase of slaves and in the plantation then under seizure ; that on the death of her husband the whole property was adjudicated to her by the Court of Probates, and that her rights are sufficient to cover the whole, and that she has a higher privilege than the bank. She further complains that the order is illegal, because it requires the payment of interest at the rate of ten per cent., which is not due according the act of mortgage.

After setting up an exception, which was overruled, and which requires no further mention here, the bank pleaded in answer, a denial of most of the facts alleged in the plaintiff's petition. They specially deny her right of mortgage, and that her late husband ever received any moneys belonging to her, or that any was invested by him in the purchase of the property mortgaged. It is further alleged, that Mrs. Stansbury has accepted the community, by applying to have the whole property composing it adjudicated to her ; and that she has further accepted by taking an active concern in the effects of the community and disposing of a part of them ; and by reason thereof she has become liable out of her own

estate for one-half of the debts contracted by her late husband. They further deny that any of the allegations in the petition justify the issuing of the injunction; and it is specially alleged that the bank is entitled to interest at ten per cent. per annum from the day the money was due. They pray a dissolution of the injunction, and that the plaintiff may be condemned to pay the debt with damages and interest.

After a second trial, judgment was rendered against the plaintiff in injunction for the whole amount of the debt, but restricting the interest to nine per cent.; and she appealed.

Her counsel has made several points before us, relating to the want of notice before issuing the order of seizure, which we think ought to be considered, inasmuch as they are not alleged in the petition for injunction.

It is contended, that the court erred in considering the opposition of the widow as authorising a change from the *via executiva* to the *via ordinaria*. It appears to us that the claim, set up by the bank, was reconventional and not a proceeding in the ordinary way, as distinguished from the summary. We think the court did not err in proceeding to inquire into her personal liability to pay the debt under that plea; but even admitting that she had accepted the community, it does not establish her liability in this case, to pay more than one-half the debt contracted by her husband.

The bank claims interest at ten per cent. from the time the money was due, upon the mortgage, under the statute of 1820, concerning loans on mortgage. 1 *Moreau's Digest*, p. 674, sec. 2.

The charter of the bank, passed subsequently, declares that the bank shall not take more than nine per cent. interest on any of its loans. It is true, this clause applies to stipulation of interest and not to interest *ex morâ* in the nature of damages. In the case of the Bank of Louisiana *vs.* Sterling et al., this court held, that the legal interest which the bank had a right to receive in such cases, is nine per cent. 2 *La. Reports*, 61.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; and

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Where the wife makes opposition and procures an injunction against proceedings in the *via executiva*, on the ground that she has a prior claim and mortgage to the property seized, and the seizing creditor answers and denies her claim and mortgage, and avers she has made herself liable for his claim, by intermeddling in her husband's succession: Held, that the demand set up in the answer was reconventional and not a proceeding in the ordinary way, as distinguished from the summary, and the court did not err in proceeding to inquire into the personal liability of the wife to pay the debt.

Banks cannot, in any case, take more interest than at the rate fixed by their charters. Where the bank charter fixes the rate of interest at nine per cent., and ten is agreed upon, it will be reduced to the rate fixed by the charter.

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**EASTERN DIST.** proceeding to give such judgment as in our opinion ought to have been rendered below, it is further adjudged and decreed,  
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**SYLVESTRE & SON**  
**ET AL.** of the interest and dissolved as to the balance, and that the sheriff proceed to make the money due on the mortgage with interest at nine per cent. per annum, from the 11th of April, 1830 ; and on the demand in reconvention, it is further adjudged and decreed, that the bank recover from the plaintiff in injunction the sum of four thousand dollars, with nine per cent. interest as aforesaid ; provided that no execution issue against her until after discussion of the mortgaged property. It is further ordered, that the bank pay the costs of both courts, except such as may arise in the execution of this judgment.

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**MILLAUDON vs. SYLVESTRE & SON ET AL.****APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

A partner may sue for and claim the dissolution, liquidation and settlement of the partnership concerns, and recover whatever sums may be found due to him on such settlement, at the same time and in the same suit.

Where an account current has been rendered to a party, and received and entered on his books without objection, he cannot afterwards object to it, on the ground that it contains overcharges or compound interest.

So, where parties, by the articles of partnership, fix the rate of interest to be charged by them at six per cent., and a partner renders an account for advances to the firm, and charges interest at ten per cent., which the partners having the direction of the firm, receive and enter upon the partnership books, it is written evidence of their assent to that rate of interest.

*7WS661* Purchasers of property, who collude with the vendor in the sale of it, with the view to defraud the true owner, cannot avail themselves of the omission to record the act of partnership under which the property is claimed.

This is an action to dissolve a partnership, and procure a liquidation and settlement of its affairs, and to recover the sum that may be found due to the suing partner from the others, and finally to set aside a fraudulent sale and mortgage of certain property belonging to the partnership.

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On the 17th February, 1830, L. Millaudon entered into partnership, by act under private signature, with Sylvestre, *père et fils*, to carry on a rum distillery and sugar refinery, in the upper faubourg of New-Orleans, for the term of five years. Millaudon was the owner of the distillery, lots of ground and slaves, which were described in the articles of partnership, and put into the concern at eighty thousand dollars, their estimated value as cash, the one-half of which was sold to Sylvestre and son for forty thousand dollars. After deducting three thousand dollars, the balance of a certain sale from Sylvestre and son, the net capital of Millaudon in the establishment, was thirty-seven thousand dollars, on which the former bound themselves to allow six per cent. interest, until its final reimbursement. This interest was to be paid annually, from the one-half the profits coming to Sylvestre and son, and the excess of these profits, if any, was to be applied to the reimbursement of the capital thus advanced by Millaudon.

On the 3d of January, 1833, the plaintiff instituted this suit, for the dissolution of the partnership, and the final settlement and liquidation of its concerns. The pleadings and other facts of the case are fully stated, and set out in the opinion of the court.

It appears that on the 25th of August, 1832, Sylvestre and son, sold and conveyed to John M. Bach "their undivided half part of all the lot, &c., constituting the distillery and refinery, and implements attached thereto;" also "their undivided half of eight slaves attached to the distillery, and of two other lots; all and singular, the above described property and slaves are the same which the present sellers acquired of Millaudon, by act under private signature, executed on the 17th of February, 1830, recorded in the office of the register of conveyances, on the 21st of February,

EASTERN DIST. 1831, and deposited and recorded in the office of Feraud,  
April, 1835. notary, on the 7th March, 1831."

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ET AL. There is a clause that the sellers retain the possession  
of this property, and enjoy it rent free, until the 25th  
February, 1835, when it is to be given up.

The price and amount of this purchase was twenty-seven thousand five hundred dollars, viz: five thousand dollars paid by Bach to the sellers, and twenty-two thousand five hundred dollars by J. Dufour, who intervened in the act, and received a mortgage, as against Bach, for the payment of his notes.

The case, so far as relates to the partnership affairs and the accounts between the plaintiffs and Sylvestre and son, was submitted to auditors, and after some modifications and amendments by the court, their report was confirmed.

The report established a heavy loss of thirty-two thousand eight hundred and thirty-four dollars thirty-six cents, and a debt due to Millaudon, by the partnership, of thirty-seven thousand seven hundred and sixty dollars eighty-four cents.

The district judge came to the conclusion that the amount actually due to the plaintiff was sixty-eight thousand and sixty-seven dollars seventy-seven cents, for which judgment was rendered against Sylvestre and son. The dissolution of the partnership and a sale of the partnership property, was decreed to satisfy the debt and judgment of the plaintiff. The sale and mortgage to Bach and Dufour, was considered collusive and fraudulent, and annulled and cancelled.

All the parties defendant, appealed.

*Soulé*, for the plaintiff, made the following points in argument.

1. The property in dispute was partnership property, and could not be disposed of by any of the parties, without the consent of the other.
2. The property has remained in the possession of the vendor after the sale, and was never delivered to the purchaser.
3. The purchaser knew the existence of the act of partnership, and, therefore, could not be ignorant of the conditions of the sale made by Sylvestre to Millaudon.

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*D. Seghers*, for the defendants, *Sylvestre and son*.

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*Mazureau*, for *Bach and Dufour*.

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*Grymes*, for the plaintiff, in conclusion.

*Martin, J.*, delivered the opinion of the court.

The plaintiff states, that in the year 1830, he entered into a partnership with the defendants *Sylvestre*, father and son, for the purpose of carrying on a rum distillery and sugar refinery, to be conducted under the direction and care of the said *Sylvestre* and son, who promised and engaged to bestow their unremitting attention thereto ; the plaintiff furnishing the necessary capital and funds. But that the said defendants have absolutely neglected and failed to comply with their said engagement and undertaking, in consequence of which, the partnership concerns have fallen into complete ruin, the buildings have become dilapidated, and much of the other property wasted and destroyed.

The petition concludes with a prayer, that the partnership be declared to be dissolved, its remaining property sold, and its affairs liquidated and closed, and that he may have judgment for the capital and funds which he has advanced, and the moneys due him by the defendants ; and for general relief.

These defendants excepted to the petition : 1st. As cumulating inconsistent demands. 2d. Because it appears by the articles of partnership, annexed to and made a part of the petition, that the period of its duration has not yet elapsed, and until that arrives, or until the dissolution of the partnership be declared by a decree of the court, or otherwise, no member of it can have any action against the others, in relation to the partnership affairs. 3d. Because the plaintiff can have no action except for such a balance as may appear due to him, on a settlement of the affairs of the partnership, and the payment of all the debts due by it.

In a supplemental petition, the plaintiff stated he had lately discovered that the defendants *Sylvestre, père et fils*,

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had clandestinely and collusively sold to J. M. Bach, an undivided moiety of all the property, both moveable and immoveable, of the partnership, with the view of defrauding him, the plaintiff. A writ of sequestration was, therefore, prayed for, to secure and hold the property, until the judgment of the court be pronounced in the case. J. M. Bach, the purchaser, was made a party to the suit, together with Dufour, to whom it is alleged, Bach had mortgaged the immoveable property purchased from the defendants, Sylvestre and son. The plaintiff prays also, that this sale and mortgage be declared null and void, and the property restored to him, or sold for the liquidation of the affairs of the partnership.

To this supplemental petition, Sylvestre and son opposed the several exceptions, which they had already taken to the original petition, and urging further, however: That the revocatory action, which it was the object of the supplemental petition to introduce, could not be cumulated with the general one, which had been instituted in the first instance, to obtain a dissolution, liquidation and settlement of the partnership affairs.

These exceptions were overruled by the court. Sylvestre and son answered, denying the allegations, charging them with misconduct in the management of the business of the partnership concern. They averred, that the plaintiff, being in the possession of all the books and papers of the partnership, they were unable and deprived by that circumstance, from stating its situation or giving any account of its affairs.

Bach and Dufour in their several answers, positively averred the fairness of the purchase and mortgage; and specially denied that there was any fraud, collusion or clandestine transaction on their part, in relation to them.

The District Court decreed the dissolution of the partnership, between the plaintiff and the defendant Sylvestre and son, and gave judgment in favor of the former, against the latter, for sixty-eight thousand sixty-seven dollars seventy-seven cents; cancelled the sale to Bach, and the mortgage from him to Dufour, and ordered the property sequestered to be sold, to satisfy the judgment. Bach and Dufour were

condemned to pay all the costs resulting from their being made parties ; and Sylvestre and son to pay all the other costs. Sylvestre, *père et fils*, Bach and Dufour, all appealed to this court.

In the argument of the cause, the counsel for Sylvestre and son, contended, that the District Court erred in overruling his exceptions, and ruling his clients to answer and plead to the merits. In support of this position, he has cited the following authorities. *Code of Practice, articles 152, 419. Louisiana Code, article 1217, et seq., 1221, et seq., 1261 and 1304. 10 Martin, 433. 3 Martin, N. S., 476.*

Nothing is sought by the plaintiff, in this suit, as set forth in his petition, but the dissolution of the partnership, the liquidation and settlement of the partnership affairs, and to recover whatever sums of money or property, may appear to be due and coming to him on such a liquidation and settlement, *i. e.* after payment of the partnership debts.

The claim of the plaintiff, to be paid whatever sum might be due to him, could not be urged, before a liquidation and settlement of the partnership concerns ; but nothing prevents him from demanding it simultaneously with that of a final settlement ; although his recovery of what is due to him, must depend on a sufficiency being left after the liquidation of the partnership.

On the merits of the case, the counsel for Sylvestre and son, contends, that the District Court erred in overruling his 3d, 5th, 8th and 9th objections to the report of the auditors, to whom the partnership accounts had been referred for adjustment.

The 3d objection was made on an allegation that compound interest was allowed on the balance of thirty-seven thousand dollars.

This objection, we are of opinion, was correctly overruled. The plaintiff appears to have made up his account current, with the partnership, in which interest is charged, and presented it to the firm, and this account with the items of interest, now deemed objectionable, were transcribed into the partnership books kept by Sylvestre and son, which were

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A partner may sue for and claim the dissolution, liquidation and settlement of the partnership concerns, and recover whatever sums may be found due to him on such settlement, at the time and in the same suit.

Where an account current has been rendered to a party, and received and entered on his books without objection, he cannot afterwards object to it, on the ground that it contains overcharges or compound interest.

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EASTERN DIST. always under their direction and control, and signed by them  
April, 1835. in several places.

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 ET AL interest is fixed at six per cent.

So, where partners, by the articles of partnership, fix the rate of interest to be charged by them at six per cent., and a partner renders an account for advances to the firm, and charges interest at ten per cent., which the partners having the direction of the firm, receive and enter upon the partnership books, it is written evidence of their assent to that rate of interest.

This objection was overruled on the same ground as the preceding ; it appearing that the item of interest, charged at ten per cent., was entered by Sylvestre and son on the partnership books, which is written evidence of his assent to that rate of interest.

The 8th objection was made and overruled on the same ground, and for the same reasons.

The 9th objection was made to a charge of interest, on an item up to December 1, 1833 ; while the defendants urge, interest should have ceased at the inception of the present suit, on the 3d January, 1833.

The interest is in fact, only calculated to the 10th January, 1833, and the debts and credits, on items other than the one objected to, are properly carried on with the interest thereon to the time of making up the account.

The attention of the court has been drawn to a manifest error of calculation. The balance reported by the auditors appears to be seventy-seven thousand two hundred and fifty-one dollars sixty cents. The district judge, sustained the claim of the defendant to a deduction of one hundred and thirty dollars, on their first objection ; of two hundred and seventy dollars, in their fourth ; and of ten thousand forty-one dollars fifty-nine cents, on their tenth objection. All these sums deducted from the balance, reported by the auditors to be due, leaves the sum of sixty-six thousand eight hundred and ten dollars. The sum allowed by the District Court, of sixty-eight thousand sixty-seven dollars seventy-seven cents, being an excess over the true balance as stated above, must be reduced to that sum ; and the charges of the plaintiff against the defendants Sylvestre and son, are in the opinion of the court, fully established by the evidence to the amount before stated, to wit, to the sum of sixty-six thousand eight hundred and ten dollars, for which he is entitled to judgment.

The district judge was satisfied from the evidence in the record that all the parties to the act of sale, (under which Bach claims the property under sequestration, and Dufour a mortgage on it, as subrogated to the rights of the vendors, Sylvestre and son,) were engaged in a fraudulent transaction, the object of which was to defraud the plaintiff. A close examination of the evidence has made the same impression on the mind of this court.

Under these circumstances we have come to the same conclusion with the District Court, that neither Bach nor Dufour can be permitted to avail himself of the neglect of the plaintiff, to cause his act or articles of partnership, between him and Sylvestre and son, to be recorded. From all that appears, it is evident they colluded with Sylvester and son, in the sale and purchase of this property.

In order to correct a clerical error which has crept into the calculations, in the judgment of the District Court, the judgment must be set aside.

EASTERN DIST.  
April, 1835.

MILLAUDON  
vs.  
SYLVESTRE & SON  
ET AL.

Purchasers of property who collude with the vendor in the sale of it, with the view to defraud the true owner, cannot avail themselves of the omission to record the act of partnership, under which the property is claimed.

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It is, therefore, ordered, adjudged and decreed, that the judgment rendered in this case in the first instance, be annulled, avoided and reversed; and this court, proceeding to pronounce such a judgment as in our opinion ought to have been given below, it is ordered, adjudged and decreed that the partnership entered into by the plaintiff and the defendants, Sylvestre and son, on the 17th of February 1830, be dissolved; and that the plaintiff recover from the latter, the sum of sixty-six thousand eight hundred and ten dollars with costs of suit; that all the property mentioned and described in the articles of partnership, and which has been sequestered in this suit, be sold to satisfy this debt and judgment, and that it be sold *in block* as incapable of division, viz: the land, buildings, dwelling, refining and distilling utensils by themselves, and the slaves by heads; that the act of sale by Louis Sylvestre and Jean Louis Sylvestre to John M. Bach, passed before Carlisle Pollock, notary public, on the 25th of August 1832, be held null and void; and that the mortgage thereon stipulated in favor of Jean Dufour on said property be

EASTERN DIST. *May, 1835.* cancelled and annulled; and that the said John M. Bach and Jean Dufour pay the costs which have been incurred, by making them parties to these proceedings. And it is further ordered, that the costs of the appeal be borne by the appellee, so far, as they concern the defendants Sylvestre and son.

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**ERSKINE ET AL. vs. COLE & CO. ET AL.**

**APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF  
NEW-ORLEANS.**

Garnishees cannot plead a demand against the defendant, by way of exception to the right of the plaintiff to recover.

The plaintiff in attachment will recover from the garnishees, whatever sum is shown to be in their hands, belonging to the defendant, at the time the attachment was levied.

The plaintiffs obtained a judgment against the defendants, their original debtors, in a case in which M. & P. Maher, were summoned as garnishees, and all the funds of the said debtors attached in their hands. The latter pleaded a large claim against the common debtors, in compensation of the funds and property of the latter, attached in their hands, and claimed the right to oppose it to the plaintiffs' demand.

The parish judge instructed the jury to inquire, *first*, whether the garnishees were indebted to the defendant or not, at the time of the attachment: *second*, how much, if any? If the garnishees owed sufficient to cover the plaintiffs' judgment, the verdict must be for the plaintiffs; and if not, for such sum as was proved to be in their hands at the time of levying and serving the attachment. They returned a verdict for the plaintiffs, upon which, judgment was rendered against the garnishees for two thousand and fifty dollars. The garnishees appealed.

This case was decided on the principles settled in the cases EASTERN DIST.  
of Blanchard vs. Cole et al., and Vairin & Reel vs. Cole et al., May, 1835.  
ante. 153, 160, 163.

PEYTAVIN  
vs.  
WINTER.

*J. Slidell*, for the plaintiffs and appellees.

*Preston*, for the appellants.

*Mathews, J.*, delivered the opinion of the court.

This case is nearly, if not precisely similar to those of *Blanchard* and *Vairin et al.* against the same defendants and garnishees. If there be any difference in the facts of the present case and those to which reference is now made, as lately decided by this court, it is favorable to the pretensions of the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

Garnishees cannot plead a demand against the defendant by way of exception to the right of the plaintiffs to recover.

The plaintiff in attachment will recover from the garnishees, whatever sum is shown to be in their hands, belonging to the defendant, at the time the attachment was levied.

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PEYTAVIN vs. WINTER.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE  
 JUDGE THEREOF PRESIDING.

An injunction will not be granted to stay execution on a judgment for damages, for causes which existed before judgment was rendered.

So, where the plaintiff in execution had a judgment for damages sustained by him in consequence of the defendant obstructing the natural drain of waters from his front tract of land by stopping certain ditches leading from it over the back land claimed by both parties, and the defendant afterwards obtains the title to the disputed premises, an injunction will not be allowed him to stay execution on the judgment for damages.

## CASES IN THE SUPREME COURT

EASTERN DIST.  
May, 1835.

PEYTAVIN  
vs.  
WINTER.

This case comes up on an appeal from the refusal of the district judge to grant the defendant an injunction as prayed for.

The facts show that Peytavin had issued his *fieri facias* against Winter, on a judgment for 1500 dollars in damages, which the former obtained in an action of trespass against the latter, for trespassing on his premises, and stopping certain ditches which Peytavin used to drain his front lands through the rear into the swamp. *See the case and judgment in 6 Louisiana Reports, 553.*

Winter presented a petition to the judge of the Second Judicial District, alleging that this judgment had been obtained through error, as the back tract of land through which these drains run, and which was then in dispute between them, had since been patented to him by the government of the United States; and that he was now the true owner thereof and had a right to enter on it. He further shows that his evidence of title to this land was erroneously rejected on the trial; that the judge omitted to establish the boundary between them; and, also, that he refused to sign certain bills of exception on the trial of this case. He prays that the execution and judgment of Peytavin be perpetually enjoined, and that he be declared to be the true owner of the land which had been the subject of contestation between them; and that Peytavin be required to stop up the ditches complained of and restrained from draining his front lands into, or through the tract now claimed by the petitioner as being the true owner; and that he have a judgment for damages sustained by him, &c.

The district judge refused to grant the injunction, being of opinion, that the allegations contained in the petition, did not authorise it. Winter, the applicant for injunction, appealed.

*Winter in propriâ personâ.*

*Bullard, J.*, delivered the opinion of the court.

This is an appeal from the refusal of the district judge to grant an injunction to stay proceedings on an execution

issued in the case of *Peytavin vs. Winter*, on a judgment pronounced by this court. See 6 *Louisiana Reports*, 553.

The only question we are to examine is, whether the petition presented for that purpose, discloses such facts as would authorise the issuing of an injunction. The petitioner represents that the judgment in favor of *Peytavin* was obtained in error, as the tract of land in dispute is now patented to him by the United States, and that the evidence of his title was rejected on trial, by the parish judge who presided, and who also refused to sign certain bills of exception, although presented to him before the rendition of the judgment, and not three days thereafter, as erroneously supposed by the Supreme Court.

On these allegations, the appellant asked of the District Court to open the judgment and grant an injunction; and, finally, that the premises in dispute might be decreed to be his property.

We are of opinion the district judge did not err in refusing the injunction: no fact is set forth in the petition which arose after the judgment, unless it be the issuing of a patent for the land, in favor of the appellant. The judgment rendered by the District Court was reversed in this, and the question of title expressly left open. The court then considered the gist of that action to be the damages sustained by *Peytavin*, in consequence of the act of the defendant obstructing the natural drain of waters from his front tract of land, by stopping certain ditches leading from it, over the back lands, claimed by both parties. We then considered that the question of title was not fairly before the court by the pleadings, and that so much of the verdict as related to title, might be disregarded, and so much of it as assessed damages for the trespass, ought not to be disturbed. The question of ownership is, therefore, still open for investigation, under the alleged patent on the one hand, and the purchase from the United States on the other: but the judgment rendered by this court, on the question of damages, must have its effect, whatever may ultimately be shown to be the

EASTERN DIST.  
May, 1835.

*PEYTAVIN  
vs.  
WINTER.*

An injunction will not be granted to stay execution on a judgment for damages, for causes which existed before judgment was rendered.

So, where the plaintiff in execution had a judgment for damages sustained by him, in consequence of the defendant obstructing the natural drain of waters from his front tract of land, by stopping certain ditches, leading from it over the back land claimed by both parties, and the defendant afterwards obtains the title to the disputed premises, an injunction will not be allowed him to stay execution on the judgment for damages.

EASTERN DIST. rights of the parties, as to the *locus in quo*; and we are of  
May, 1835. opinion the injunction was properly refused.

DUBERTRAND

<sup>vs.</sup>  
LAVILLE.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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DUBERTRAND vs. LAVILLE.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE  
THEREOF PRESIDING.

The law makes the verdict of a jury a distinct and essential document, connecting the judgment of the court with the anterior proceedings.

The verdict of the jury must be reduced to writing, and signed by the foreman, with the mention of his capacity.

It is not a sufficient compliance with the requisitions of the constitution, that the verdict be recorded on the minutes of the court, in the English language, it must be reduced to writing, and signed by the foreman in that language.

So, where a verdict was reduced to writing, and signed by the foreman, in the French language, it was set aside as unconstitutional, and the cause remanded for a new trial.

The plaintiff in this case, obtained a verdict and judgment against the defendant, on two promissory notes of two thousand dollars each. The jury, in rendering their verdict, reduced it to writing, and it was signed by the foreman in the French language, upon which, judgment was pronounced accordingly.

The defendant's counsel moved for a new trial, on the ground that the verdict being written in the French language, was null and void.

The district judge overruled the motion, being of opinion that, although the verdict was given in the French language,

it was recorded on the minutes of the court, in the presence of the jury, in the English language, which he deemed sufficient. The defendants appealed.

EASTERN DIST.  
May, 1835.

DUBERTRAND  
vs.  
LAVILLE.

*Porter*, for the plaintiff.

*J. Seghers*, for the appellant, objected to the judgment, because it was founded on a verdict which was written and delivered in the French language, which is in violation of the constitution of the state of Louisiana, *art. 6, sec. 15.*

2. The judgment must, therefore, be reversed as unconstitutional.

*Martin J.*, delivered the opinion of the court.

The defendant in this case is appellant from a judgment rendered against him on two notes of hand, for two thousand dollars each, secured by a special mortgage on certain property. He seeks to reverse the judgment, on the ground that it was rendered on a verdict written and recorded in the French language.

The record shows that the attention of the District Court was drawn to this matter, and the irregularity of the verdict and judgment expressly stated in an application for a new trial, in which it was suggested, that as there was no valid verdict, there was no legal trial, but only a mis-trial.

The judge *a quo* overruled the motion for a new trial, supposing that the irregularity relating to the verdict, was cured by the record of it, on the minutes of the court, being in the English language, made in the presence of the jury; the verdict being of itself no judgment, but only the mere evidence of the facts found by the jury.

Perhaps a verdict is the judgment of the jury, or the facts of the case *ad questionem facti respondent juratores*: be that as it may, the verdict is most certainly a judicial proceeding, and as such, is, by the constitution of this state, required to be conducted in the language in which the constitution of the United States is written.

The recording of it, however, on the minutes of the court, would satisfy the constitutional requisition, but the law makes

The law makes the verdict of a jury a distinct and essential document, connecting the judgment of the court with the anterior proceedings.

The verdict of the jury must be reduced to writing and signed by the foreman, with the mention of his capacity.

It is not a sufficient compliance with the requisitions of the constitution that the verdict be recorded on the minutes of the court, in the

## CASES IN THE SUPREME COURT

EASTERN DIST. the verdict a distinct substantive and essential document,  
*May, 1835.* connecting the judgment of the court with the anterior  
 proceedings.

PALFREY

*vs.*

HIS CREDITORS.

English language : it must be reduced to writing and signed by the foreman, with the writing and sign-  
 reduced to mention of his capacity.

It is, therefore, impossible, in our opinion, to recognise any thing which the clerk may write on the minutes of the court,

as the essential document which the law requires to be reduced to writing, and signed by the foreman of the jury.

So, where a verdict was re-  
 duced to writing  
 and signed by  
 the foreman, in

the French lan-  
 guage, it was set aside as uncon-  
 stitutional, and reversed, the verdict set aside, and the case remanded for a new trial ; the costs of appeal to be borne by the plaintiff and appellee.

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**PALFREY vs. HIS CREDITORS.**

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

Where the payment of a note, executed by a commercial firm, is secured by mortgage which stipulates to secure the endorsee, not only on the original note, but for any renewals that may take place, and the renewal is made in the individual name of the liquidator of the firm : *Held*, that the debt is not novated or the mortgage released, but that the transferee and endorsee of the mortgage and note, can recover and enforce payment against the mortgaged premises.

The renewal of a note secured by mortgage, does not novate the original note and debt, so as to extinguish its release and the mortgage as its accessory, when a renewal is provided for in the mortgage, even if it be renewed in a different name, but proven to be the same debt.

This case comes before the court on an opposition filed by the Bank of Louisiana, to the tableau of distribution of the

funds of the estate of the plaintiff by the syndics of his creditors. The counsel for the bank alleges, that it is not placed on the tableau as a mortgaged creditor for the sum of sixteen hundred and twenty dollars, being the amount of a note executed by H. W. Palfrey, and endorsed by L. Lesassier, and secured by a mortgage on certain slaves. The opposition alleges, these slaves have been sold by the syndics and the proceeds passed to the credit of L. Millaudon and the United States Bank. The counsel for the bank prays that the tableau be amended, so as to allow its claim and mortgage.

EASTERN DIST.  
May, 1835.

PALFREY  
TO  
HIS CREDITORS.

The original debt was due on a note executed by Palfrey, Dyson & Co. It was afterwards renewed by Palfrey giving his own note as liquidator of the partnership, with L. Lesassier as endorser, who had been secured by a mortgage on the slaves in question. The mortgage extended and expressly provided for renewals of this note; and the one presented by the opponents is shown to be a renewal of the original one, and held by the bank as endorsee, to which corporation Lesassier assigned the mortgage.

The district judge was of opinion, there was no force in the objection that the debt was originally due by Palfrey, Dyson & Co., and the note now signed by Palfrey alone. The tableau was amended, so as to admit the bank as a privileged creditor on the proceeds of the mortgaged slaves, for the amount of its claim and interest. Millaudon, whose interests as a creditor were affected by this judgment, appealed.

*J. Slidell*, for the appellants.

1. The mortgage was originally given to secure various debts of Palfrey, Dyson & Co., for which Lesassier was security. These debts have been paid and extinguished. Another obligation, viz: that of Palfrey individually, was substituted; this constituted a novation. *La. Code, art. 2181, 2185. 1 La. Reports, 527, Morgan vs. His Creditors.*

2. The mortgage did not attach in favor of the new obligation, an express reservation to that effect not having been

## CASES IN THE SUPREME COURT

EASTERN DIST. made either by Lesassier or the Bank of Louisiana. *La. Code, May, 1835.*

**PALFREY  
vs.  
HIS CREDITORS.**

2191. The original debt having been extinguished, the mortgage ceased to exist. *La. Code, 3252.*

3. The District Court erred in admitting parole testimony, to show that the note held by the Bank of Louisiana was in renewal of a note of Palfrey, Dyson & Co.; the bill of exceptions to the admission of that testimony is as well taken. *La. Code, 3272.*

*Peirce, Conrad and Preston,* for the appellees.

*Mathews, J.,* delivered the opinion of the court.

In this case the bank claims a preference and privilege on the proceeds of the sale of certain slaves, which were sold by the syndics of the insolvent, &c. This claim was allowed by the court below, from which Millaudon, who appears to be a creditor to a large amount, appealed.

The claim of the bank is founded on a transfer to that corporation, of a mortgage made by the insolvent to Louis Lesassier, to secure the latter against loss or damage, which he was liable to suffer in consequence (amongst other obligations assumed in favor of Palfrey, Dyson & Co.) of endorsing certain notes, for the use and benefit of that firm. The act of hypothecation embraced other property besides the slaves now in question, but the right secured on these only, was transferred to the appellees. The mortgage purports to secure the endorser, not only in relation to the notes given at the time of making it, but also for any renewals that might be made of these notes. Palfrey, Dyson & Co. dissolved partnership previous to the failure of the head of the firm, who was appointed liquidator of its concerns, and in that capacity he executed the note, (about which the present contest arises) in renewal of one which had been given in the name of the company, and to which the mortgage directly attached.

Where the payment of a note, executed by a commercial firm, is secured by a mortgage, which stipulates to secure the endorsee, not only on the original note, but for any renewals that may take place, and the renewal is made in the individual name of the liquidator of the firm: Held, that the debt is not novated or the mortgage released, but that the transferee and endorsee of the mortgage and note can recover and enforce payment against the mortgaged premises.

The objections raised against the pretensions of the Bank are based on the supposition of novation as to the first note, and consequent extinguishment of the debt for which the

mortgage was given, and as a corollary, the extinguishment of that act itself, being only an accessory which could not survive the principal obligation.

These objections would perhaps be well founded and ought to prevail, were it not that the act of mortgage provides a security in favor of the endorsee, in the event of renewals. The same parties to the hypothecation continued throughout this entire transaction, and had the parties to the note remained precisely the same, no question in relation to the continued validity of the whole contract could possibly have arisen.

After the dissolution of the partnership, it is in evidence that Palfrey acted for the firm, in liquidating its concerns. Whether, in his capacity as liquidator, he could have renewed a note so as to bind his partners, is a question not involved in the present case, they not being parties to this suit. Bound *in solido*, the debt may be considered *quo ad* the creditors, as entirely his own; and the testimony of Colson proves the note, on which the appellees claim, to have been made in renewal of that which was directly secured by the mortgage. This testimony, it is true, was excepted to, but we do not consider the objections legally substantial. The facts disclosed do not tend to alter the substance and nature of the contract; they have a tendency merely to show its origin and nature.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, at the costs of the appellant.

EASTERN DIST.  
May, 1835.

PALFREY  
vs.  
HIS CREDITORS.

The renewal of a note secured by a mortgage, does not novate the original note and debt, so as to extinguish it and release the mortgage as its accessory, when a renewal is provided for in the mortgage, even if it be made in a different name, but proven to be the same debt.

EASTERN DIST.  
May, 1835.

LAMEYER  
vs.  
ROUZAN.

LAMEYER vs. ROUZAN.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF  
NEW-ORLEANS.

The danger which a purchaser may apprehend of ultimate eviction on account of minors being interested in the property sold, ought to have been considered before he bought and paid the price of adjudication. It will not authorise an injunction to restrain the owners from receiving the proceeds of the sale which have been deposited in bank.

Courts of justice will not interfere in the contracts or transactions of men to redress wrongs, or prevent evils only very remotely probable, or barely possible in their occurrence.

This suit commenced by injunction. The plaintiff shows that he became the purchaser of certain immoveable property, in the city of New-Orleans, which belonged to minors living in France, and which had been seized in an attachment suit against said minors. That he purchased it for the sum of twelve thousand dollars, and the purchase money, after paying a small judgment rendered in said suit, amounting to the sum of eleven thousand five hundred dollars, was deposited in Bank. See *Chiapella vs. Couprey et al., ante*, 84.

He now alleges, that said property was owned by three minor children in France, and that the defendant who is their attorney in fact, is about receiving the balance of the proceeds of said sale and purchase, which was deposited in bank, as before stated; and, "that from the inspection of the proceedings had in said suit, both before and after the sale, and of the documents on file therein, as well as from other information, he is advised there is just reason to fear he will be disquieted by said minors in an action of eviction, as they are by no means bound by the proceedings and judgment in said suit, in which their interests were not properly defended and they not made parties," &c. He prays for an injunction to restrain the bank from paying over

the money, until said minors, who are now at an age to be emancipated by marriage or otherwise, shall approve of the sale or give security, that he shall not be disquieted in his possession, &c. The injunction was granted as prayed for.

The defendant excepted to the petition, on the ground that it contained no cause of action, or allegations necessary to maintain an injunction ; and that it is false that the plaintiff has any reason to fear, that he will be disquieted in his possession, &c.

On hearing the arguments in the case on these pleadings, the court was of opinion the plaintiff had just reason to fear he would be disquieted in his possession, and maintained and perpetuated the injunction. The defendant appealed.

*D. Seghers*, for the plaintiff.

*Denis*, for the defendant and appellant.

*Mathews, J.*, delivered the opinion of the court.

This is a suit in which an injunction was prayed for to prevent the defendant from receiving a certain sum of money which had been deposited in the Bank of the Consolidated Association, by order of the court below. The injunction was granted, and afterwards made perpetual, and from which the defendant appealed.

The money in dispute proceeds from a sale of property seized and sold by the sheriff, und era *fieri facias*, which issued on a judgment rendered in a suit where in one Chiapella was plaintiff *vs.* Couprey *et al.* That suit commenced by attachment, which was levied on a lot and the buildings thereon, situated on Dauphin-street, in the city of New-Orleans, the property of certain minors who reside in France with their mother and tutrix. The interests of the defendants were represented by a curator *ad hoc*, regularly appointed in pursuance of certain provisions of the *Louisiana Code* and *Code of Practice*.

The injunction was allowed and maintained by the court below, on the supposition that the purchaser at sheriff's sale

EASTERN DIST.  
May, 1835.

LANFATER  
TO.  
ROUZAN.

The danger  
which a purcha-  
ser may appre-  
hend, of ulti-  
mate evic-tion,

EASTERN DIST. may possibly be disturbed in his property and possession, by  
May, 1835. the defendants in execution, who are minors, after they

LANEYER  
vs.  
ROUZAN.

arrive at the age of majority. The question of any ultimate

danger of eviction, to which the plaintiff in the present suit

on account of may or may not be exposed, is one which we do not consider  
minors being interested in the property sold, ought to have been considered before he bought and paid the price of adjudication. It will not authorise an injunction to restrain the owners from receiving the proceeds of sale which have been deposited in bank.

The proceedings in that under which the property was sold, appear to have been conducted in the mode prescribed by law for similar pursuits. The danger which seems now to be apprehended, ought to have been taken into view by the purchaser, before he bought and paid the price of adjudication. We are of opinion that no substantial and legal grounds are shown to exist, on which the injunction ought to be maintained. We are not acquainted with any principles of jurisprudence requiring courts of justice to

Courts of justice will not interfere in the contracts or transactions of men, to redress wrongs or prevent evils which are very remotely probable, or barely possible in their occurrence.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be reversed and annulled, and that the injunction be dissolved which was obtained by the plaintiff and appellee, at his costs in both courts.

EASTERN DIST.  
May, 1835.

LAFOURCADE VS. BARRAN.

LAFOURCADE  
VS.  
BARRAN.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF  
NEW-ORLEANS.

An acknowledgment and promise by the debtor, that a debt is just and he will pay it, on a contingency, which soon after happens, is a sufficient promise and assumpsit, to interrupt prescription after it is complete, and bind the promisor in a new obligation to pay.

This suit is instituted for the recovery of the amount of five promissory notes executed by the defendant in favor of the plaintiff in Bourdeaux, in France, and payable in New-Orleans, amounting in all to one thousand two hundred and nineteen dollars eighty cents, exclusive of interest.

The defendant admitted his signature to the notes sued on, but denied that he was liable or indebted to the plaintiff for their amount ; and pleaded the prescription of five years, in bar of the action. On a comparison of the dates of the notes sued on, it was evident that five years had elapsed, in regard to all of them, from the time they became due and payable, before the commencement of suit.

The testimony showed, the defendant on being written to by the plaintiff's attorney to pay the notes, called on the latter and stated, that "the demand was a just one, but that he had no means, not even money to go to market ; and that a suit would only increase the expenses, without possibility of recovering any amount. He said, the only chance of being paid, was for the plaintiff to wait the death of his wife ; if she died first, he would be her heir, and in such case, the whole amount would be paid ; but, that if he died before his wife, the whole would be lost. After the death of defendant's wife, he told plaintiff's attorney, that his wife was dead, and that he would pay the claim as soon as her estate was settled. He several times afterwards stated that the property of his wife was to be sold, and after the

EASTERN DIST. sale he would pay the plaintiff's demand," &c. He finally  
May, 1835. refused, and resolved to plead prescription.

LAFOURCADE  
 vs.  
 BARRAN.

The parish judge on this evidence, decided, that the defendant by his reiterated promises, interrupted and waived all prescription in his favor. Judgment was rendered against him for the amount of the plaintiff's claim, from which he appealed.

*Denis, for the plaintiff.*

*D. Seghers, contra.*

*Mathews, J., delivered the opinion of the court.*

This action is founded on several promissory notes, made by the defendant in favor of the plaintiff, for the amount of which judgment was rendered in the court below, and an appeal taken by the former.

The making of the notes is not denied, but the defendant

An acknowledgement and promise by the debtor, that he will pay it on was commenced, shows a period of sufficient length to support the prescription of five years, as pleaded. Interruption, however, is alleged on the part of the plaintiff, and, as believed by the court below, was fully proven; and from an attentive examination of the testimony, our minds have been brought to the same conclusion, as the case involves no other question, and this being one of fact.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

EASTERN DIST.  
May, 1835.

HERMANN & SON  
vs.  
LA. STATE  
INS. CO.

HERMANN & SON vs. LOUISIANA STATE INSURANCE CO.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Any one partner of a commercial firm, has power to dispose of the personal property of the society for the use and benefit of the firm.

The signature of one partner in matters of simple contract, relating to the partnership, will bind the firm.

So, where A brings a ship or vessel into partnership with B at a certain valuation, and B takes out a policy of insurance on the vessel, and in his own name transfers it to C and the vessel is lost: *Held*, that C is entitled to receive the insurance money in preference to the creditors of A, and who were such when he brought the vessel into the partnership.

This case comes up in the present instance, on a contestation between several claimants of the proceeds of an insurance on the schooner Eliza Thomas. See the original case, 7 *Louisiana Reports*, 502.

The evidence shows, that J. Dufart being the entire owner of the schooner Eliza Thomas, entered into partnership on the first of July, 1833, with A. Baron, and put the schooner into the partnership at a certain valuation, by which Baron engaged to account to Dufart for four thousand five hundred dollars, being one-half of the valuation of this and another vessel. On the 7th of July, a policy of insurance was taken out on said schooner in these words: "A. Baron, for account of whom it may concern, does make insurance on the Eliza Thomas."

On the 17th July, Baron advertised the dissolution of the partnership for reasons assigned: Dufart resided at Tampico; the schooner was lost in September following; and the loss finally adjusted at three thousand nine hundred and twenty dollars. Previous to the loss, the plaintiffs, Hermann & Son, exhibited to the president of the insurance company, this policy with the name of "A. Baron" endorsed in blank on the back of it. The endorsement was afterwards filled up with a special assignment to the plaintiffs.

## CASES IN THE SUPREME COURT

**EASTERN DIST.** Kohn and Bordier, judgment creditors of Baron, and  
**May, 1835.** Delpeuch, a judgment creditor of Dufart, all of them having  
**HERMANN & SON** obtained their judgments in 1834, after the foregoing transac-  
vs.  
**LA. STATE**  
**INS. CO.** tions, but before the insurance money in question was paid over, made seizures on this fund in the hands of the insurance company. The question is, who is legally entitled to it.

The district judge came to the conclusion, that the assignment of the policy by Baron *alone*, did not divest the interest of the partnership. Judgment of non-suit was rendered against all the plaintiffs and the other claimants, from which they all appealed.

*Strawbridge*, for the plaintiffs.

1. This case has been already adjudged and determined, as regards the rights of the defendants and appellees.  
 2. The opposing creditors can only examine the matter, so far as the rights of the individual partners are concerned, of whom they are creditors respectively. What are their shares? *3 Kent's Commentaries*, 14. *Gow on Partnership*, 223. *Collyer, ibid.*, 472. *Louisiana Code*, 2794.

3. The transfer of the policy to the plaintiffs must be regarded: it cannot be treated as a nullity. *Louisiana Code*, 1965. *5 Martin, N. S.*, 261, 633. *6 Ibid.*, 137, 324, 581. *2 Louisiana Reports*, 215. *4 Ibid.*, 340.

4. A partner cannot sue the firm for a particular claim or transaction, but must wait until a liquidation is had of the partnership affairs. *10 Martin*, 433. *11 Ibid.*, 331. *3 Martin, N. S.*, 478. *6 Ibid.*, 655. *2 Louisiana Reports*, 450.

5. A partner has authority to sell or pledge the partnership or personal effects. *Gow*, 68. *Collyer*, 315. *3 Kent*, 17.

*J. Slidell*, for Kohn and Bordier.

*Soulé*, for Delpeuch.

*Mathews J.*, delivered the opinion of the court.

This case presents a contest between the plaintiffs and several intervening parties, relative to rights claimed by them on the amount of a policy of insurance, which has

been paid into the court below, under a decree of this court, rendered in the cause at the last January term, by which it was remanded for further proceedings between the plaintiffs and intervenors. In pursuance of this order, the several pretensions of these parties were submitted for decision to the District Court, which rendered a judgment on non-suit against them all, and they all appealed. Thus we have appellants in abundance, but it is somewhat difficult to find an appellee, as the insurance company can no longer be considered as a party litigant, after the decision of the Supreme Court, and payment of the money as required by our former judgment.

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In this view of the case, it offers for our consideration no questions except those which arise on the relative claims and rights of the appellants.

They all united in the pursuit against the defendants, so far as it related to a recovery of the sum claimed ; but since the prize was obtained, we find a triple dispute respecting its ownership. The plaintiffs claim the whole as assignees, and transferees of the policy from A. Baron, who obtained it from the insurance company. The intervenor Delpeuch claims it by seizure on a *fieri facias*, as being the sole property of Dufart, who was a commercial partner of Baron at the time when the policy was obtained. And Kohn & Bordier, a third intervening party, claim as creditors seizing the property of Baron. By deciding against the claims of these parties, the court below has left the property without an owner, for we had previously determined that the defendants had no right to retain it. This decision may be correct, if it be true that no one, nor all the claimants, have then a right to cause the money deposited to be appropriated to their use, which should, consequently, remain in deposit, until the rightful owner shall apply for it.

The most concise mode of settling these disputes, is to examine the pretensions of the different claimants separately, for if we find one entitled to the whole sum, the conflict between the other two will cease for want of a subject of contention.

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To begin then with the claim of the plaintiffs, which is first in order, we have already stated that they base their right of recovery on a transfer from Baron, at whose instance the policy in question had been obtained. At the time of obtaining it, he and Dufart were associated in a commercial partnership, and the vessel which was insured, formed a part of the partnership property. The insurers assumed the risks insured against, for whom it might concern, *i. e.* for those who might have an insurable interest in the schooner, and the evidence of the case shows, that this interest was in the commercial firm of Baron & Dufart. It is, however, contended against the pretensions of the plaintiffs, and in favor of those set up for the intervenor Delpeuch: 1st. That the schooner Eliza Thomas was previous to the co-partnership of Baron & Dufart, the sole property of the latter, and that as the conditions of the association were not complied with on the part of the former, no change of ownership ever took place; 2d. But admitting that it did state the assignment and transfer being made, after a publication in one of the public papers printed in this city, of a notice by Baron, that he would no longer consider Dufart as a partner, for reasons disclosed in his advertisement, the partnership ought to be considered as having been dissolved from that date, and Baron had no longer any right to transfer, or in any manner dispose of the partnership property, consequently the assignment to the plaintiffs should be treated as an absolute nullity; 3d. The transfer is void as to Dufart's interest, not having been made in the social name.

It appears by the contract of partnership, that Dufart put into the common stock, two vessels, the half value of which was estimated at about four thousand dollars, which sum was to be accounted for by his partner, but no time was specified when he should account; and we are of opinion, that he could only be compelled to account and refund this portion of the stock to the original proprietor, on a liquidation and settlement of the whole partnership concerns; until then, the property thus brought in must be viewed

as common. If, however, a dissolution had regularly been made, and was known by the plaintiffs at the time they took the transfer from Baron, they would perhaps have acquired no right under it; but neither of these facts is established by the evidence. The reasons given in the publication of Baron, as causes for annulling the contract, might possibly have prevailed in a suit for that purpose; certainly they do not of themselves, simply by making them known to the public, operate a dissolution of the partnership. Contracts, generally speaking, can be annulled only in one of two ways: by consent of the parties, or for legal causes shown in a court of justice; yet were we to allow this effect to the publication, the record affords no proof that the assignees, in the present instance had knowledge of it.

In the further examination of the questions presented by this case, we take for granted, power and authority, in all or any one member of a commercial partnership, to dispose of the personal property of the society, for the use and benefit of the firm during its continuance.

It is laid down as a general rule, by a late writer on partnership, that the signature of one partner, in matters of simple contract relating to the partnership, binds the firm. See *Collyer's Treatise on Partnership*, page 239.

In the present case, Baron, who had obtained the policy in question, on the vessel which was at the time partnership property, was in possession of that instrument, which, whether negotiable under commercial law or not, was clearly transferable according to the principles of our laws, which authorise a transfer of all choses in action. The record does not in our opinion, afford any evidence of fraud or collusion between the acting partner who made the transfer of the contract to the plaintiffs, and the latter, by which the insurance company became liable to pay the amount of the policy, which seems to us to have been legally transferred to them, by a valid agreement.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and

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Any one partner of a commercial firm has power to dispose of the personal property of the society for the use and benefit of the firm.

The signature of one partner in matters of simple contract relating to the partnership, will bind the firm.

So, where A brings a ship or vessel into partnership with B, at a certain valuation, and B takes out a policy of insurance on the vessel, and in his own name transfers it to C, and the vessel is lost: Held, that C is entitled to receive the insurance money, in preference to the creditors of A, and who were such when he brought the vessel into the partnership.

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EASTERN DIST. annulled; and it is further ordered, adjudged and decreed,  
*May, 1835.* that the money now deposited in the court below, be paid  
over to the plaintiffs, and that the intervenors Delpuech and  
Kohn & Bordier pay the costs of the appeal in equal  
portions.

SPENCER  
vs.  
SLOO.

## SPENCER vs. SLOO.

## APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a judgment, which was rendered in another state on a mortgage, according to the forms of proceeding there, and which liquidates the original debt which the mortgage was given to secure, is made the foundation of a suit here, for the balance which the mortgage property failed to pay; and the debtor was not in the state, or served with process, nor appeared either in person, or by attorney to the suit: *Held*, that such judgment is not evidence of the balance of the debt claimed; but, that it is still open for a defence on the merits of the original claim.

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Parole evidence, although inadmissible to prove title to immoveable property and slaves, or to destroy such title, yet, it is admissible to establish collateral facts connected with the transaction.

This is an action founded on a judgment obtained on a mortgage in a proceeding by *scire facias*, against the mortgaged property according to the laws of the state of Ohio. The plaintiff alleges, there is still a balance due of seven thousand one hundred and thirty-two dollars on said judgment, for which he prays judgment against the defendant residing here.

The defendant excepted to his being made liable or held answerable in relation to the judgment sued on; that it was obtained by a proceeding *in rem*, to which he was not a party, and was not served with process; that he never appeared, either in person or by attorney; and was in fact, not a resident of the state at the time.

The district judge being of opinion the judgment sued on, was *prima facie* evidence of the demand, overruled the exception and required the defendant to answer to the merits.

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May, 1835.

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SLOO.

An answer was put in setting up a defence, founded on a complete discharge of the defendant from the original debt. After hearing the evidence adduced and the arguments of counsel, the District Court gave a judgment for the defendant. The plaintiff appealed.

*G. B. Duncan*, for the plaintiff and appellee.

1. This suit being instituted on a judgment rendered in the state of Ohio, obtained in due form of law, under the statutes of that state between citizens, cannot be impeached in the courts of this state. It is entitled to absolute verity as record evidence. It being proved by competent testimony, that in the courts of Ohio from whence this judgment is taken, would be deemed and taken as record evidence, and conclusive upon the defendant, it should have the same effect here. *Constitution of the United States, article 4, section 1. Act of Congress, 27 May, 1790, chapter 3. 1 Peters' C. Reports, 74. Ibid., 155. 17 Massachusetts Reports, 545, 546. 1 Dallas, 191. 7 Cranch, 481. 3 Wheaton, 234. Sergeant on Constitutional Law, chapter 31. 3 Story's Commentaries on the Constitution of the United States, 174 to 183.*

2. The original judgment in Ohio being rendered on a contract made in that state, between citizens, must be governed by the laws of that state in force at the time, and it is a legal presumption, that the contract was made in reference to those laws. *Story's Conflict of Laws, 75. 13 Massachusetts Reports, 16. 11 Martin, 2. 2 Ibid., N. S., 601, 602, 603. 11 Ibid., 608.*

3. No contract, subsequent to the original agreement, can be set up as a discharge, if it is alleged or proved that it occurred in the state of Ohio, unless it is legal, and of reciprocal binding force according to the laws of that state. *3 Dallas, 371, note. 6 Massachusetts Reports, 358, &c. 7 Martin, N. S., 409.*

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4. A contract entered into in another state, and to be executed there, must receive in this state the same interpretation as it would have received in that state. *2 Louisiana Reports*, 115.

5. The object of citation being to give the defendant notice of the pendency of a suit, and a personal privilege not necessary to the jurisdiction of the court, the defendant may waive it, either at the commencement of the suit, or if under the laws of a state which do not require it, he does so when he enters into his contract.

6. The judge erred in admitting testimony to effect this judgment.

7. The judge erred in admitting the testimony of witnesses, or any parole evidence to show, that the original agreement had been discharged by sale of real estate in the state of Ohio to said plaintiff. The laws of that state offered and received in evidence in this case, requiring that all such sales should be in writing and acknowledged.

8. The evidence in the case fully proves the plaintiff's claim as set forth in his petition.

*Worthington, contra.*

*Bullard J.*, delivered the opinion of the court.

The plaintiff sues upon a judgment recovered by him, in the state of Ohio, on a *scire facias*, upon a mortgage given by the defendant, upon a house and lot in Cincinnati. The mortgaged premises having been sold under a writ of *levari facias*, issued in pursuance of that judgment, this suit is instituted to recover the balance adjudged to the plaintiff in that case, and the exemplification of the record is relied on as conclusive evidence of the debt.

The defendant first set up as an exception, that the judgment in question was obtained in a proceeding *in rem*, that it is not pretended he was served with process, or appeared personally or by attorney. He further alleges, that at that time he was not within the jurisdiction of Ohio, and that he had no notice of these proceedings. This exception

being overruled, the defendant pleaded to the merits, and set up a final settlement and discharge, previous to the *ex parte* proceedings in Ohio, and alleges that said proceedings were fraudulent, and the judgment obtained in fraud and violation of his rights.

Judgment being rendered in favor of the defendant, the plaintiff appealed.

The effect of the judgment on the *scire facias*, in Ohio, has been much discussed at the bar, and the statute authorising such proceedings has been produced, together with the opinion of counsel, and adjudicated cases, in the highest court of that state.

The statute authorises a mortgagee to obtain from the Supreme Court, or the County Court of the county in which the premises are situated, a *scire facias* on the mortgagor, to show cause why the mortgaged premises should not be taken in execution, and sold to satisfy the money due and owing, according to the conditions and covenants contained in such mortgage. It provides, that if the defendant on being returned summoned, or on two writs of *scire facias*, returned *nihil*, shall not appear, judgment by default shall be entered, and the court shall proceed according to law, to assess the damages, and enter final judgment thereon, on which a writ of *levavi facias* shall issue. The third section declares, that "if the mortgaged premises so taken in execution be not sufficient to satisfy the said judgment, then the residue of said judgment, so remaining unsatisfied shall be deemed and taken to be a debt of record, for which the plaintiff or plaintiffs, may issue a writ or writs of *scire facias*, and proceed thereon to judgment and execution as in other cases." *Statutes of Ohio, page 252.*

The proceedings in this case, stopped with the judgment on the first *scire facias*, or the return of the two *nihilis*, and no new *scire facias* appears to have been sued out.

It seems to be settled in the state of Ohio, that the mortgagee who has taken his judgment on the *scire facias* on a mortgage cannot resort to his original cause of action and maintain an action of assumpsit, debt or covenant, but that

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May, 1835.

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## CASES IN THE SUPREME COURT

EASTERN DIST. the bond or note, or other evidence of debt, merges in the judgment on the *scire facias*. *Ohio Reports, condensed, 75.*

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**SLOO.**

Where a judgment, which was rendered in another state on a mortgage, according to the forms of proceeding there, and which liquidates the original debt which the mortgage was given to in a court of equity, on showing that the judgment was obtained, long after the original debt had been extinguished, and the mortgage cancelled. We are not to presume that the jurisprudence of that state, is so defective as to afford no remedy in such a case, and that a judgment recovered *ex parte*, against an absentee, would be enforced although obtained after the original cause of action had in fact been extinguished. We are of opinion, therefore, that in the case, as relates to the balance claimed on the judgment, it is still open in our courts, and that such a defence, if established by evidence, must prevail.

This brings us to the merits of the defence. The defendant alleges, that he conveyed the mortgaged premises to Longworth, Carneal & Irwin, in trust for certain purposes specified in the conveyance. That in August, 1820, two or three years before the judgment in question, Spencer the plaintiff, made an agreement with them to take their conveyance of the property in fee, and to pay them about six thousand dollars over and above the amount of his mortgage. That in pursuance of that agreement, a conveyance was executed by them to Spencer, on the 29th August, 1820. He further alleges, that said Longworth, with the consent of Spencer, and under a certain agreement with him, not now necessary to specify, conveyed the same property to the Bank of the United States, and, that afterwards, Longworth paid Spencer the sum of three thousand five hundred dollars in full discharge of his claim.

In support of the leading facts thus detailed, the plaintiff was called on to produce on trial, and did produce the deed of the 5th April, 1820, from Longworth, Irwin and Carneal, to him. This deed appears to have been signed, sealed, and delivered, and it is shown that Spencer received the rents from March 4th, 1820, till January 4th, 1822.

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The defendant, independently of the parole evidence of the record, further produced a letter addressed by Spencer to the present defendant, written many years after these transactions, making inquiries relative to a previous mortgage on the same property in favor of one Best, and particularly whether that mortgage had not in fact, been paid off by Sloo to Carneal. In the course of that letter he takes occasion to say, "I find on reference to Irwin, Carneal and Longworth's deed to me, dated 5th April, 1820, that the consideration named is three thousand six hundred dollars. This formed an additional objection with me, to taking the deed, as I was to pay six thousand five hundred dollars, and wanted a warranty to that amount. My claim against Mr. Longworth rests on this, that I took three thousand six hundred dollars, for my lien on the property, on his statement, that the mortgage to Best was unpaid, and a fien at the time I took said three thousand five hundred dollars."

There is in the record a memorandum, in pencil mark, made by Spencer, but not signed, which was admitted in evidence as an *adminiculum*, to wit: "August 25th, 1820, deed from Irwin, Carneal and Longworth to Spencer; about August, 1821, deed from same for same property to Bank of United States; judgment on mortgage, 19th September, 1823. December 12, 1823, agreement with N. L. to take three thousand five hundred dollars for mortgage, supposing that a prior lien existed."

The record contains numerous bills of exception, some of which require to be noticed. The testimony of Carneal and others, taken on commission, was objected to on various grounds, and particularly that no parole evidence could be admitted to impeach the validity of the judgment, recovered against the defendant in Ohio, that the witness was a party

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EASTERN DIST. to the transactions, that no parole evidence could be introduced, until the deed of trust was produced; the law of May, 1835. Ohio requiring written evidence of such trusts.

BREWSTER ET AL.

VS.

SAUL.

Parole evidence, although inadmissible to prove title to moveable property and slaves, or to destroy such title, yet it is admissible to establish collateral facts connected with the transaction. It is not shown that the witnesses had any interest in this case, and it is an obvious answer to the first part of the objection, that a part of the transaction, on which the defendant relies, as a release in the nature of novation, took place after the rendition of the judgment. We think the court did not err in permitting the depositions to be read. In the case of *Andrus vs. Chretien*, we held that although parole evidence is inadmissible to prove title in slaves, or to destroy such title, it is admissible to establish collateral facts connected with the transaction. *7 Louisiana Reports*, 318.

The testimony in the record, corroborated by written evidence, emanating from the plaintiff himself, has satisfied us as it did the court of the first instance, that the plaintiff is not entitled to recover.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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BREWSTER ET AL VS. SAUL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the plaintiff mistakes a part of the name of the defendant, he can amend and correct it by giving the true name, even after the original petition is served.

The agent is allowed to prove his agency, and that he sold the goods to the defendant for and on account of his principal, even when the latter was unknown at the time to the person buying.

The principal may always institute an action on a contract made by his agent in relation to his affairs, and hold the party liable.

Where goods are sold and delivered to an agent for an unknown principal, the latter is suable when he is discovered.

This is an action to recover six hundred and twenty-five dollars, the price of a barouche which the plaintiffs allege they sold to the defendant, by their agent, Mark Walton. The defendant was described and named as Thomas S. Saul, in the original petition. After service and return of the sheriff, the plaintiffs amended their petition, and corrected the defendant's name to that of Thomas H. Saul, to which he excepted: 1st. Because no amendment can be admitted, by which a new and different defendant is substituted to the original one against whom suit is brought; 2d. Because a copy of the original petition has never been served on him, and he is ignorant of its contents. These exceptions were overruled. The defendant then pleaded a general denial to the merits.

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The plaintiffs proved by Mark Walton, their agent, and who sold their carriages in New-Orleans, that he made a bargain with the defendant, who agreed to take a certain carriage for six hundred and twenty-five dollars, payable in three months; or if not paid at that time, the defendant was to give a draft on his father, payable the 1st of January following; that he was to take the carriage away the following Monday after he purchased it. This occurred on Friday, and the carriage was got ready for defendant and kept standing at the front door for two weeks. It is still ready for delivery when demanded.

This witness also proved his agency for the plaintiffs, but declares he has no interest in the event of this suit. He does not know, whether at the time of the sale he stated to the defendant, or the latter knew the fact, that he was acting as agent of the plaintiffs in making the sale.

The defendant's counsel objected to the witness as being incompetent to testify in this case.

The plaintiffs had judgment for the amount of their claim. The defendant appealed.

*J. Slidell, for the defendant and appellant.*

*Preston, contra.*

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*Martin J.*, delivered the opinion of the court. In this case the original petition described and called the defendant by the name of Thomas S. Saul. The sheriff returned on the citation, that service was made in that name, accordingly. Before any further proceedings were had, the plaintiff filed an amended petition, suggesting that the defendant was called Thomas H. Saul, and not Thomas S. Saul, as his name was erroneously alleged to be in the original petition. He had leave to amend the pleadings in this respect.

The defendant's counsel excepted to the amendment and proceedings admitting it, alleging that it was erroneously granted, as it substituted a new defendant in the place of the original, and that the first petition had not been legally served on him. These exceptions were overruled, and the defendant required to answer to the merits. He pleaded the general issue. Judgment was pronounced against him, and he appealed.

In the opinion of this court, the exceptions were correctly overruled. The plaintiff himself alleges and shows that an error was committed by writing the defendant's name Thomas S., instead of Thomas H. Saul. This is not denied; neither is it averred that there is any such person as Thomas S. Saul. The sheriff has returned that he delivered the petition.

On the merits, it is shown by the oath of Walton and that of his son, that the former is the plaintiffs' agent for the sale of carriages in New-Orleans; and that he sold for them the carriage to the defendant, at the price and for the sum for which the present suit is brought.

It does not appear that Walton informed the defendant, or that the latter knew at the time, that the carriage was sold for the account of the plaintiffs: hence, the defendant contends that Walton's testimony was improperly received, and so was that of his son.

This objection does not appear to amount to any thing. The principal may always institute an action on a contract made by his agent, in regard to his (the principal's) affairs;

Where the plaintiff mistakes a part of the name of the defendant, he can amend and correct it by giving the true name, even after the original petition is served.

The agent is allowed to prove his agency and that he sold and delivered the goods to the defendant for and on account of his principal, even when the latter was unknown at the time to the person buying.

The principal may always institute an action on a contract made by his agent in relation to his affairs, and hold the party liable.

Where goods are sold and delivered to an agent for an unknown principal, the latter is suable when he is discovered.

and we are not aware that it was ever held, in any case, that where the principal was ignorant that the agent acted for him as such at the time, that this circumstance formed an exception to the general rule. In the case of *Williams et al vs. Winchester, 7 Martin, N. S.*, 22, this court held that "when goods are sold and delivered to an agent for an unknown principal, the latter was suable when discovered"; that the defendant was liable to the plaintiff to whom he was unknown, having contracted with him through an agent, without knowing who he was; or that the person he contracted with was an agent.

The agency in the present case is fully proved by another witness.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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GOODALE  
vs.  
HIS CREDITORS.

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GOODALE vs. HIS CREDITORS.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF  
NEW-ORLEANS.

A creditor who has a special mortgage or the vendor's privilege, on certain property surrendered by his debtor, and at the sale by the syndics, bids for it and it is adjudicated to him, he cannot be required to pay the price of the adjudication, but may retain it in satisfaction of his claim, except so far as it exceeds the amount of his mortgage; on his giving security to refund or meet any charge, that may afterwards be legally ordered.

Mortgage creditors, are authorised to resist any attempt to sell the mortgaged property, otherwise, than for the immediate payment of the mortgaged debts.

The proceeds of the sale of mortgaged property, remains subject to the same rights and privileges, which the creditor had on it before the sale.

EASTERN DIST. Syndics who have funds arising from the sale of the insolvent's property,  
May, 1855. are bound to distribute them without delay.

GOODALE Where there are higher or concurrent mortgages or privileges, than that of  
vs. the creditor to whom the mortgaged premises have been adjudicated, or  
HIS CREDITORS. where he is required to support a portion of the charges of the *cessio bonorum*, he cannot retain the *price* of the purchase, in satisfaction of his privileged claim.

This case commenced with a rule taken by the syndics of the creditors of N. Goodale, on L. G. Hilligsberg, to whom seven lots of ground, being part of the ceded property, were adjudicated at a public sale, for the price of eleven thousand eight hundred dollars, in cash, to show cause why he should not comply with the terms of sale and pay over the amount; that he refuses to do so, although a bill of sale in due form of law has been made and tendered to him; and that in default of payment, a writ of *distringas* shall issue against him to enforce a compliance.

The defendant on the rule, in answer thereto, stated that he was a mortgaged creditor, having sold the property now purchased by him, to the insolvent for the sum of sixteen thousand nine hundred and fifty dollars; of which, two instalments of five thousand six hundred and fifty dollars each, are now due, which, together with interest thereon, amounts to eleven thousand six hundred and sixty-two dollars. Having retained a special mortgage with the vendor's privilege on said property, he avers he has the right to retain so much of the price of adjudication, in satisfaction of his claim, as will extinguish it, on his giving security, until it be shown by the tableau of distribution whether any other one has a better right to said property than himself.

He further avers that the excess of his purchase or price of adjudication over his claim is one hundred and thirty-eight dollars, which he tenders to the syndics, on receiving a deed of sale, and on the execution of which, he is willing to give them good personal security and a mortgage on the property.

On hearing the parties on this rule, the parish judge being satisfied that the grounds taken by the defendant therein, were fully sustained by the evidence; ordered, that the rule

be discharged, and that the defendant be authorised to retain the price of adjudication to him, on his paying the excess and giving security to the syndics as he proposed ; and that they make him a title to the property. The syndics appealed.

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May, 1835.  
GOODALE  
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HIS CREDITORS.

*Strawbridge*, for the appellants.

*D: Seghers, contra.*

*Martin, J.*, delivered the opinion of the court.

This case grows out of the proceedings in disposing of the property of the insolvent. The syndics are appellants from the decision and order of the parish judge, in discharging a rule which they had taken on L. G. Hilligsberg, to whom certain lots (part of the ceded property) had been adjudicated, to show cause why he should not pay the price of adjudication, or on his failing to do so, a *distringas* should not issue against him. They have also appealed from an order of court, directing them to convey the premises to the defendant, in this rule, on his paying to them the sum of one hundred and thirty-eight dollars, and giving them personal security and a special mortgage on the premises for the payment of the whole, or such part of his claim as might be disallowed ; or for such a part of the costs and charges of the failure as he may be liable to pay, on the final adjustment of its concerns.

It appears from the facts of the case that Hilligsberg was the original vendor of the premises in contest to the insolvent ; and that he had retained thereon a special mortgage and privilege to secure the sum of eleven thousand six hundred and forty-two dollars, and that he provoked a sale of them, and they were adjudicated to him for eleven thousand eight hundred dollars. He immediately tendered the sum of one hundred and thirty-eight dollars, which was the difference between the price or two sums for which he had sold and repurchased the same property. He also tendered personal security, together with a special mortgage on the premises in the manner ordered by the judge as above stated.

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The counsel for the syndics of the insolvent has not denied the nature and amount of Hilligsberg's claim, but he has contended that the latter is bound by his purchase to pay the amount of the adjudication into the hands of the syndics, where it must remain until a distribution of it, with the other funds, among the creditors, on a tableau filed and order of the court thereon.

The counsel on the other side, contends that a creditor, who by his contract has secured to himself the pledge of real property, to secure his debt, cannot legally be deprived of it by legislative enactment; and that the court is bound to construe any act in which the destruction of such a pledge is claimed to the inquiry of the creditor, so as to prevent its impairing the obligation of the contract.

A creditor who has a special mortgage or the vendor's privilege, on certain property surrendered by his debtor, and at the sale by the syndics, bids for it and it is adjudicated to him, he cannot be required to pay the price of the adjudication, but may retain it in satisfaction of his claim, except so far as it exceeds the amount of his mortgage, on his giving security to refund or meet any charge that may afterwards be legally ordered.

Mortgage creditors are authorised to resist any attempt to sell the mortgaged property, otherwise than for the immediate payment of the mortgaged debt.

The only question presented for the solution and decision of the court is, whether the special mortgage, together with the vendor's privilege, when the vendor has provoked the sale of the premises after the failure of his vendee, and when they have been adjudicated to him at the sale, may retain the price of the adjudication, on his offering sufficient security to refund in case he is, on the final decision of the matter, required by law to refund.

The law abhors waste, even waste of time, or useless delay. It favors the loan of money on landed security without the additional burden of an endorsement. On the representations of some of our banking institutions, that the interest of mortgaged creditors may be jeopardized by an erroneous construction of the laws relating to a surrender of the mortgaged property, the legislature has protected them by an exemption from the common danger they apprehended.

Mortgage creditors are authorised to resist any attempt to sell the mortgaged property, otherwise than for the immediate payment of the mortgaged debt. *2 Moreau's Digest*, 429.

The proceeds of the sale of mortgaged property remain subject to the same rights and privileges which the creditor had on it before the sale. *Ibid.*, 433. When syndics have funds in their hands arising from the sale of the effects of the insolvent, they are bound to distribute them

*without delay.* *Ibid.*, 433, section 33. *Lex neminem cogit ad vana.* In vain would the syndics require the mortgage creditor who has provoked the sale of the premises for his immediate payment, and to whom they have been adjudicated to make payment, except for so much of the price of adjudication as exceeds his legal claim. The syndics, were they to receive it, would be bound to distribute it *without delay*. The mortgagee would have, as the law expressly says, the same right and privilege on the price or proceeds, which he had before the sale on the land itself; *i. e.* the right of being paid by preference out of these funds.

Payment to the syndics in most cases, would be injurious to the mass of the creditors whose interests they are bound to protect, by the accumulation of useless interest.

Two circumstances, however, may authorise the syndics to resist the pretensions of the mortgage creditors to retain the amount of their purchases. *First*, the existence of higher or concurrent mortgages or privileges. *Secondly*, the obligation of the mortgagee to support a portion of the charges of the *cessio bonorum*. The existence of other mortgages or privileges is a matter susceptible of easy proof. *De non apparentibus et non existentibus eadem est lex.*

The liability of the mortgagee to suffer a deduction of his claim and to support a part of the charges of the *cessio bonorum*, is a matter which is susceptible of being approximately ascertained.

In the present case, the existence of higher or concurrent mortgages or privileges is not pretended or shown, nor is the liability of the mortgagee to support any portion of the charges of the *cessio bonorum*, urged as being in any degree probable. It is true, the several creditors of the insolvent have the undoubted right, individually or otherwise, to oppose the claim of any other creditor as regards its nature and extent.

But the syndics represent them all, and it is not to be expected, that they would wrongfully neglect to urge any legal means of resistance or defence of their rights and interests which might be known to them.

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May, 1835.

GOODALE  
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HIS CREDITORS.

The proceeds of the sale of mortgaged property remains subject to the same rights and privileges which the creditor had on it before the sale.

Syndics, who have funds arising from the sale of the insolvent's property, are bound to distribute them without delay.

Where there are higher or concurrent mortgages or privileges, than that of the creditor to whom the mortgaged premises have been adjudicated, or where he is required to support a portion of the charges of the *cessio bonorum*, he cannot retain the price of his purchase in satisfaction of his privileged claim.

## CASES IN THE SUPREME COURT

EASTERN DIST.  
May, 1835.

GOODALE  
vs.  
HIS CREDITORS.

Certain and absolute claims must be paid. Qualified, conditional or contingent ones, cannot be discharged, until they are liquidated and decided to be just and legal; and in the meantime they have the right of demanding protection and security. If the qualification, condition or contingency relates not to the *nature* but to the *quantum* of the claim, the court may order the deposit of an approximate sum.

In the present case, there is not even a suggestion of any higher or concurrent privileged claim in relation to the property purchased, nor any probability of any liability to a deduction for charges attending the property surrendered. The judge *a quo*, has secured the rights of individual creditors against being concluded by the acts of the syndics, by requiring from the purchasing creditor, both personal security and a mortgage. He has in our opinion, discreetly exercised a legitimate power, by refusing to subject the creditor to a destruction of his lien on the proceeds of the sale of the mortgaged premises.

The right of a mortgaged creditor to be protected in the preservation of his pledge, according to the terms of his contract, is one of those natural rights and inestimable privileges which have been considered of such high importance, as to be secured by a constitutional provision, even against the errors of legislation. This imposes on the judiciary the obligation and duty of avoiding any interpretation of the laws which may endanger those rights.

When we consider that syndics give no security; that they are frequently appointed by the votes of chirographary creditors, who have often an interest directly opposed to mortgage creditors; that an insolvent who is tutor to a minor, to whom he owes, or appears to owe more than to his other creditors may, by his single vote appoint himself their syndic, (as is said to have been the case in an insolvency happening in the parish of Lafayette,) and as such, release every conventional mortgage he may have given, every judicial one his creditors may have obtained, and the legal privileges and mortgages which the law has provided for the security and protection of the wife and minor children; and

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in this way leave all of them with no other security than the personal responsibility of the syndic, the insolvent debtor himself. Nor is this all: the insolvent thus made syndic, whose duty it is to administer, receive and pay over the funds of the estate to the creditors, is one to whom our law attaches the presumption of being a *fraudulent debtor!* Courts of justice must, therefore, feel bound to guard the rights of mortgage creditors, and to save and avoid their utter destruction by too rigid an adherence to the letter of the law.

EASTERN DIST.  
May, 1835.

ZACHARIE  
vs.  
BUCKMAN ET AL.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, at the costs of estate surrendered.

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ZACHARIE vs. BUCKMAN ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

8 N 528

The action of the creditor to avoid the contracts of his debtor, made in fraud of his rights in cases of insolvency, is prescribed in one year from the date of his judgment.

Where the evidence shows, that the sale by the debtor to a creditor was made for the purpose of protecting the property against the pursuits of other creditors, the debtor being insolvent at the time, any one, or all of the other creditors have an action to annul the sale, as made in fraud of their rights.

But, where one creditor takes a mortgage on the property of his debtor on the eve of insolvency, it will be binding as against the other creditors, unless the knowledge of the debtor's insolvency at the time is brought home to the mortgage creditor.

This is an action to annul a sale made by the debtor to a creditor on the eve of bankruptcy, in fraud of the legal

## CASES IN THE SUPREME COURT

EASTERN DIST. claims and rights of the plaintiff, who is also a creditor.  
May, 1835. The plaintiff shows, that on the 8th of March, 1834, he obtained a judgment against one James Tanner for the sum of four thousand four hundred and twenty-seven dollars, twenty cents; and he further alleges, that at the time Tanner became indebted to him, he was the owner of two lots in the faubourg Lafayette, and being in embarrassed circumstances transferred them to one Geo. W. Woodman with a view to protect them from his creditors; and that said sale was simulated and made in fraud of his rights, the consideration money stated therein never being paid; that Woodman and wife are both dead, but have left two minor children under the protection of, and represented by Henry Buckman, their tutor. He prays that the tutor be cited, that the sale be annulled, and that the property be declared subject to his judgment against Tanner.

The defendant Buckman answered and averred, that the action was prescribed, and that the plaintiff was not a creditor of Tanner at the date of the sale of these lots to Woodman, on the 22d May, 1829; and he denies that the sale was in fraud of the plaintiff's rights, and that the minors of Woodman are the *bonâ fide* owners of said property.

The sale sought to be annulled, was made by authentic act and dated the 22d May, 1829. Tanner took a counter-letter from Woodman in which the latter bound himself to re-convey the premises, on or before the 22d May, in 1833, in case the former paid him one thousand five hundred and sixty-six dollars in cash, and delivered up his note for the balance within that time. The note was soon after the sale, surrendered in part performance of the condition on the part of Tanner, but nothing more paid.

The plaintiff obtained judgment against Tanner for the amount of his demand on the 8th of March, 1834, and this suit was commenced the 8th of May following.

The district judge, being satisfied that the evidence supported the plaintiff's allegations, rendered judgment annulling the sale and subjecting the property to the plaintiff's judgment against Tanner, reserving one thousand

two hundred dollars of the proceeds to the minors of EASTERN DIST.  
May, 1835.  
Woodman. The defendant appealed.

*Strawbridge*, for the plaintiff.

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*Preston*, for the defendant and appellant contended, that the counter-letter, taken in connexion with the bill of sale, shows that Tanner made a *bond à fide* sale, with the power of redemption to the late Geo. W. Woodman. The sale was made the 22d May, 1829, and was redeemable at any time before the 22d May, 1833.

2. Tanner having failed entirely to redeem the lots by paying the sum of one thousand five hundred and sixty-six dollars, within the time agreed on, the sale became absolute, and neither Tanner, and much less his creditors, can annul it and receive back the property. *Louisiana Code, articles 2545, 2548, 2563.* 4 *Louisiana Reports*, 142.

3. This action is prescribed by law. *Louisiana Code, articles 1973, 1982, 1987.*

4. Woodman gave Tanner the full value of the property in paying him the one thousand five hundred and sixty-six dollars. The evidence shows, that four years afterwards, at the appraisement of Woodman's estate, these lots, with all the improvements he had put on them, together with the increase in the value of property, were only valued at two thousand dollars.

5. The parole evidence shows, that the lots were to be forfeited to Woodman, if not redeemed within the specified time.

6. The fact of Tanner giving up the counter-letter or bond, proves that he waived *his right of redemption*. His account of doing so after Woodman's death, as related by one of the witnesses, is no evidence against Woodman's heirs. The testimony is illegal and was excepted to.

7. There is an error in the judgment in not allowing Woodman's heirs one thousand five hundred and sixty-six dollars, the sum their ancestor actually paid, instead of only one thousand two hundred dollars.

EASTERN DIST.

*May, 1835.*

ZACHARIE

*vs.*

BUCKMAN ET AL.

**Bullard, J.**, delivered the opinion of the court.

In this case the plaintiff sues to annul a sale and conveyance of certain lots of ground, made by his debtor to the ancestor of the defendants, on the ground of simulation and fraud.

The defendants plead: 1st. Prescription; 2d. That the plaintiff was not the creditor of the vendor, previously to the sale in question; and 3d. That they are the *bonâ fide* owners of the lots. Judgment being rendered in favor of the plaintiff, the defendants appealed.

The action of the creditor to avoid the contracts of his debtor, made in to the plaintiff to a considerable amount, for which debt of his judgment has since been recovered, shortly before the commencement of insolvency, is prescribed in one year from the date of his judgment.

The evidence appears to us satisfactory, that Tanner, the vendor, was at the time of the conveyance, a debtor to the plaintiff to a considerable amount, for which debt judgment has since been recovered, shortly before the commencement of this action. The prescription in such cases runs from the date of the judgment recovered against the debtor, and that plea cannot in this case avail the defendant.

*Louisiana Code, 1899.*

Where the evidence shows that the sale by the debtor to a creditor, was made for the purpose of protecting the property against the pursuit of other creditors, the debtor being insolvent at the time, any one or all of the other creditors have an action to annul the sale, as made in fraud of their rights.

It is shown that Woodman, the purchaser, was a creditor of Tanner, and that this sale was made for the purpose of protecting the property against the pursuits of other creditors, Tanner being at the time insolvent, and at the same time to secure to Woodman the debt due him. A counter-letter was executed at the time of the sale, which was produced on the trial of this case, and from which it would appear, that Woodman bound himself to re-convey the property, on Tanner's paying him on or before the 22d May, 1833, the sum of one thousand five hundred and sixty-six dollars, and delivering up to him his note for the balance of the apparent price of the property. Two or three days afterwards the note was given up to Woodman, as appears by an acknowledgment on the counter-letter.

It is contended by the counsel for the defendants, that this counter-letter, taken in connexion with the conveyance, constitutes a real sale, with a clause of *réméré* or right of redemption, within the period limited by the contract, and that the right not having been exercised within that time, can no longer avail the vendor, and that the title has become irrevocably vested in Woodman. It appears to us that the

counter-letter shows, even as between the parties themselves, EASTERN DIST.  
that the pretended sale was a simulation; and we are May, 1835.  
now asked to give it effect against third persons and ZACHARIE  
creditors, to establish the reality of the sale, although the vs.  
immediate surrender of the note, in part performance of  
the condition on the part of Tanner, shows a continuance of  
the same fiction. The real nature and character of the  
contract, appears to us to have been, to secure to Woodman  
the debt due to him by Tanner. If he had taken a mortgage  
on the lots for the security of his debt, the transaction might  
have been perfectly legal, and binding on the plaintiff as  
a creditor, unless the knowledge of Tanner's insolvency was  
brought home to Woodman. To this extent the judgment  
of the District Court gives effect to the contract, by decreeing  
that the representatives of Woodman shall retain out of  
the proceeds the amount due him, according to article 1978,  
of the Louisiana Code. We do not think it necessary to  
examine the bills of exception in the record, because, inde-  
pendently of the evidence excepted to, it appears to us there  
is sufficient in the record to sustain the judgment of the  
District Court.

But where one  
creditor takes a  
mortgage on the  
property of his  
debtor, on the  
eve of insolven-  
cy, it will be  
binding as a  
against the other  
creditors, unless  
the knowledge of  
the debtor's in-  
solvency at the  
time, is brought  
home to the  
mortgage credi-  
tor.

It is, therefore, ordered, adjudged and decreed, that the  
judgment of the District Court be affirmed, with costs.

EASTERN DIST.

May, 1835.

ARCENEAUX

v.

JOURDAN ET AL.

ARCENEAUX VS. JOURDAN ET AL.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE  
JUDGE THEREOF PRESIDING.

An appeal is not required to be made returnable to the *first* Monday in the month or *term*, but may be made returnable to any day of the month in the *next* term after it is granted, if there be time for the legal delay.

In the late Superior Court of the territory, the first Monday in each month or term was the return day.

Where it is alleged that an error to the prejudice of the maker of a negotiable note, endorsed in blank, was made in calculating the amount for which it was given, parole evidence will be received to explain and correct the error, even if the note is in the hands of a third person, who received it in *autre droit*, when he sustains no injury thereby.

This is an action to recover the amount of a promissory note, executed by Jourdan and endorsed by Fagot, for eighteen hundred and forty-one dollars thirty-five cents, payable on the 1st of March, 1834. When it became due it was regularly protested for non-payment. The note was drawn by Jourdan, payable to the order of Fagot. The defendants denied that they were indebted as alleged, and for the amount claimed. They averred that Jourdon, one of the defendants, purchased a plantation at the sale of the succession of A. Arcenaux, the ancestor of the plaintiff, and gave his promissory note to Louis Menier, the administrator of said estate, for four thousand one hundred and thirty-five dollars thirty-three cents: that afterwards, about the date of the note sued on, at the special instance and request of Menier, to enable him to liquidate and settle the succession, and apportion it among the heirs, the first note was given up and the amount divided into smaller ones, of which the note sued on was one, and which was delivered to the plaintiff as one of said heirs. That, in substituting the new notes for the old one, an error of one thousand dollars was committed in the calculations,

and the new notes given for the aggregate sum of five thousand one hundred and thirty-five dollars thirty-three cents, instead of four thousand one hundred and thirty-five dollars thirty-three cents. That the note now sued on was given in error to the amount of one thousand dollars, and was handed over by the administrator to the plaintiff, as his share of his father's succession. They further state, that before the note became due, this error was discovered and made apparent; and that Menier placed the sum of one thousand dollars in the hands of the plaintiff, to cover this error, which was to be deducted from the note when it became due; and that the defendant tendered the balance when said note became due, and was ready then and always since, to pay the same.

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On the trial, the evidence showed the error complained of by the defendants, as stated in their answer. But this testimony was objected to by the plaintiff, on the ground that the plaintiff was third holder of the note, in good faith; that Menier was no party to the suit, and under the issue joined, the court could not determine whether or not there was any error in the settlement between Menier and Jourdan: the court sustained the objection, and a bill of exception was taken.

Judgment was rendered in favor of the plaintiff, for the amount of the note. The defendant appealed.

Roman and J. Seghers, for the plaintiff and appellee, moved to dismiss the appeal.

1. This appeal was granted on the 25th November, and is made returnable to the third Monday of December following, instead of the first Monday of January. The return day, as fixed by law, is the first Monday in every month.

2. The present law requires that the appellee be cited to appear in the appellate court at its next term, which is in accordance with the law of 1813, regulating the practice in the Supreme Court, which says, "such citations shall be made returnable at the next term of the Supreme Court.

*Code of Practice*, 383. 1 Martin's Digest, 440.

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May, 1835.

ARCEAUX  
*vs.*  
JOURDAN ET AL.

3. The act of 1813 is also in accordance with the act of 1807, regulating the practice of the superior court, which provided that the appeal and citation should be returnable on the *first* Monday of the month or term to which the appeal was taken. The appeal in this case is, therefore, illegal and should be dismissed. 1 *Martin's Digest*, 432, 434. 3 *Louisiana Reports*, 440.

4. The judgment of the inferior court is correct, and should not be disturbed. For, unless the consideration of a note is illegal and void, the holder can recover, and cannot be affected by any equitable consideration between the drawer and third persons. 3 *Martin*, 90.

5. The maker of a promissory note cannot avail himself against an endorsee, without notice, of any equity he may have against the payee. 9 *Martin*, 86. 1 *Ibid*, N. S., 150. 3 *Louisiana Reports*, 241.

*Nicholls*, for the defendant.

1. The payment of one thousand dollars in error, is fully established, which entitles the defendant to the reversal and correction of the judgment.

2. The district judge erred in rejecting the parole testimony offered to prove the error and the transaction.

3. The error of one thousand dollars to the prejudice of the defendant, was admitted and explained by the administrator to the parties concerned, and the plaintiff among the rest.

4. The sum deposited in the plaintiff's hands, by the administrator, to correct this error, became a payment on the note.

5. The admission of Menier, the administrator, and the deposite of the money, placed it beyond his control or power. It became the property of the appellant, and was placed in the appellee's hands to liquidate his debt, to that amount.

*Martin, J.*, delivered the opinion of the court.

This is an action on a promissory note. The defendants are sued as the makers and endorsers of a note. They

averred in their answer, that the note sued on, with several others, were given in exchange for one of a larger amount; that the original note was given for the price of a tract of land, which formed part of the estate of the plaintiff's ancestor, and which had been sold by Menier, the administrator thereof, and adjudicated to Jourdan, for whom his co-defendant, Fagot, became security; that the exchange was made to facilitate the partition and distribution of the price among the heirs; and that an error was committed in making the calculations, in consequence of which the amount of the notes given in exchange, exceeded by one thousand dollars that of the original and larger note. To be relieved from the consequences of this error, an averment was made in the answer, that it had been discovered by Menier, the administrator and vendor of the property purchased, who, in order to correct it, had paid one thousand dollars to the plaintiff. From this error the defendants sought relief; they failed to obtain it, and have appealed to this court.

The plaintiff moves to dismiss the appeal, on the ground that it was made returnable on the third Monday of December, instead of the first Monday of January following.

This is assuming a position which appears to the court untenable, viz: that the first Monday of a term is the only legal return day in it. A contrary decision was made by this court a few weeks ago, in the case of *Petit et al. vs. Drane, ante* 218.

The present appeal was allowed on the 25th of November, and was correctly made returnable in the month of December, being the *next term* thereafter, and on the third Monday in the same, because there was not sufficient time, in the opinion of the judge *a quo*, to prepare and send up the record, and cite the appellee in, at an earlier day.

The counsel for the plaintiff, in support of his motion to dismiss, has referred the court to the *Code of Practice*, article 585. 3 *Louisiana Reports*, 440; and also, 1 *Martin's Digest*, 432, 434.

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ARCKNAUX  
vs.  
JOURDAN ET AL.

An appeal is not required to be made returnable to the *first* Monday in the month or *term*, but may be made returnable to any day of the month in the *next term* after it is granted, if there be time for the legal delay.

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In the late Superior Court of the territory, the first Monday of each month or term was the return day.

We are of opinion, that the *Code of Practice*, and the case from the Reports, cited, support the conclusion to which we have already come. The quotations and parts of the Digest relied on, do not appear to be in any respect applicable to this case. They only show, that in the Superior Court of the territory, the first Monday in each month or term, was the return day.

On the merits, it is established by legal evidence, that in consequence of an error made in the calculations, in giving new notes, they exceed in amount one thousand dollars, the original or larger note, for which they were given in exchange, and in its place, to accommodate the heirs, by dividing the original sum into several smaller ones. On the discovery of this error, Menier, the administrator, deposited the sum equal to it in the hands of the plaintiff, to enable him to allow, without lessening his share or doing him injury, the deduction which the vendee would be entitled to claim.

Where it is alleged that an error to the prejudice of the maker of a negotiable note, endorsed in blank, was made in calculating the amount for which it was given, parol evidence will be received to explain and correct the error, even if the note is in the hands of a third person, who received it in *autre droit* when he sustains no injury thereby. It is true, the plaintiff received the note sued on in *autre droit*, i. e., in right of his wife and another heir, a minor, for whom he was tutor; but as he does not allege he paid over any money which he received for them, (and he has most certainly not paid the amount of the present note) he is bound to correct the error, and cannot be injured thereby.

What proportion of the thousand dollars, which has occasioned this error, may be claimed on the note in suit, even if the note remains to be ascertained, and which appears to be no difficult matter. The price of the land for which the original note was given, was four thousand one hundred and thirty-five dollars thirty-three cents, and which was divided, and smaller ones including the note sued on, were given in lieu thereof.

The error of one thousand dollars against the purchaser, when he gave the smaller notes, being admitted by the administrator and vendor, it follows, that the aggregate amount for which the new notes were given, was five thousand one hundred and thirty-five dollars thirty-three

cents, *i. e.*, they were given for nineteen dollars and forty-five cents excess over the true sum, in every hundred dollars. In that proportion the note sued on is to be reduced. Its present amount being one thousand eight hundred and forty-one dollars thirty-five cents, a deduction of three hundred and seventy-eight dollars fifteen cents must be made, which leaves one thousand four hundred and sixty-eight dollars twenty-three cents, as the true sum to be recovered,

EASTERN DIST.  
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vs.  
HIS CREDITORS.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and proceeding to give such a judgment, as in our opinion ought to have been given below, it is ordered, adjudged and decreed, that the plaintiff recover from the defendants *in solido*, the sum of one thousand four hundred and sixty-eight dollars twenty-three cents, with interest at the rate of ten per cent. per annum, from the third day of August, 1834, until paid, with costs of suit in the District Court; the plaintiff and appellee paying the costs of the appeal.

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#### BOISMARE vs. HIS CREDITORS.

##### APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A ceding debtor, who is a merchant or a bookseller and stationer, and keeps books of accounts, is bound to surrender and present to the judge all his commercial books, before the order is granted staying proceedings against him or his property, and calling a meeting of his creditors.

The repeal of general laws, as regards their obligatory force in the administration of justice, ought not to destroy the force of principles which were established when they were in force, when these principles comport with natural justice as applied to the conduct of men.

## CASES IN THE SUPREME COURT

EASTERN DIST. In cases of insolvency and bankruptcy, fraud is presumed against the  
*June, 1835.* insolvent, and courts of justice should act on this principle when that presumption is supported by the evidence of facts which corroborate it.

**BOISMARE**  
vs.  
**HIS CREDITORS.** So, where the insolvent made a cession of his property and prayed for the benefit of the insolvent laws, but withheld his commercial books or books of account: *Held*, that he is thereby debarred from any benefits or privileges provided by the laws for the relief of insolvent debtors.

On the 14th May, 1834, the petitioner presented his petition accompanied by a schedule of his debts, credits and pecuniary affairs, alleging, that from the embarrassment of the times, depreciation of property, general loss of confidence and credit now existing in the community, he finds it impossible to meet his engagements; he, therefore, prays the court to accept a cession of his property for the benefit of his creditors, and call a meeting of them to deliberate on his affairs, &c.; and that all judicial proceedings be stayed as regards his person and property, and that he be discharged from all his debts.

A meeting of creditors took place before a notary public, in which they accepted the property surrendered and appointed syndics. These proceedings were filed in court on the 23d June, and on the 27th of the same month, E. A. Canon, Esq., counsellor at law, appointed by the court to represent the absent creditors, filed his opposition to the privileges and benefits of the insolvent laws being accorded to the insolvent, because he had not complied with the requisitions of said law; that he was a merchant and kept a set of books; that he was a bookseller, stationer, and sold paper hangings, and has entirely failed to bring his commercial books into court for the inspection of his creditors, as the law requires. He further states, that the insolvent shortly before his failure, sold and transferred his bookstore and paper hangings to two of his relations, and that an inspection of his account books and a knowledge of his business transactions are highly important to the creditors. He, therefore, opposes the homologation of the proceedings in the case, so far as they exempt the person of the insolvent, and put him out of the reach of his creditors.

The evidence established the fact, that the insolvent was a bookseller, stationer and seller of paper hangings, and that he kept books of accounts, which he refused to bring into court; and that he had sold and transferred his establishment as alleged.

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June, 1835.

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TO.  
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The counsel for the insolvent insisted, that he could not be deprived of the benefit of the insolvent laws, except on an accusation of fraud, for causes expressed in the act of 1817, relating to voluntary surrenders by insolvents.

The district judge was of opinion that the production of the mercantile or account books of the insolvent, was a necessary prerequisite to entitle him to the benefit, relief and discharge under the insolvent laws. Judgment was rendered accordingly.

The insolvent debtor appealed.

*Hennen*, for the appellant.

*Canon, contra.*

*Mathews, J.*, delivered the opinion of the court.

On the 4th of May, 1834, the insolvent filed his petition in the court below, praying to be permitted to surrender his property for the benefit of his creditors; and annexed a schedule thereof and debts, sworn to as required by law. On this an order was obtained for a meeting of the creditors before a notary public. The order was made on the 14th of the month and year aforesaid, and the meeting commenced on the 16th of June following, and proceedings were continued before the notary, until proof of their claims was made by the creditors, and syndics were appointed. These proceedings were filed in court on the 23d of June. On the 27th of this month an opposition was filed by E. A. Canon, Esq., who had been appointed to represent the absent creditors. He objected to the right of the debtor to obtain the benefit of our insolvent laws, on account of not having complied with all the prerequisites established, as conditions precedent to the grant of the privilege to cede his property and thereby

EASTERN DIST. be relieved from personal molestation, &c. This opposition  
June, 1835. stood over from June, 1834, until February, 1835, without  
being acted on by the court.

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In the meantime, one of the syndics first appointed had resigned, and another was put in his place some time in the month of September. Further proceedings in relation to the insolvent's estate were then had, which continued to the 20th of October, and on the 25th of that month, they were filed in Court, and a rule taken on the creditors and all others concerned, to show cause on the 8th of November, why these proceedings should not be homologated. No cause was shown on the day appointed, and the rule was made absolute, and the proceedings ordered to be homologated.

Subsequent to this time, the syndics proceeded to sell the property of the insolvent; and matters remained in this state until the 7th of February, 1835, when judgment was rendered on the opposition, which had been filed on the 27th of January preceding, as above stated. The judgment being in support of the opposition and against the privileges claimed by the insolvent, he appealed.

Against the correctness of this judgment, it is contended on his part that the homologation of the proceedings which took place before the notary, is conclusive as to their legality, and consequently affirmative of all the rights and privileges claimed by the ceding debtor, under our system of insolvent laws; as no means are pointed out by law, whereby an insolvent may be deprived of the benefits secured to him, except in charges of fraud, made on oath, and found to be true by a jury.

The opposition made in the present instance, is not based on any specific charge of fraud, but on the ground of neglect on the part of the insolvent, in not surrendering his books of accounts as required of him, he being a merchant or shopkeeper. The evidence taken on the trial shows clearly

A ceding debt-  
or, who is a  
merchant, or  
bookseller and  
stationer, and  
keeps books of  
hangings, and that he kept books of account, in which his  
business transactions were entered. He was then evidently  
in the predicament of merchants, and was bound by law to

present to the judge, before whom the proceedings *in concurso* were pending, all his commercial books. This ought regularly to have been done before the order was granted, calling a meeting of creditors and staying proceedings against the person and property of the debtor.

In the petition for leave to surrender his property, and in which the protection accorded to honest insolvents is asked for, no mention is made of his occupation. The judge, therefore, who made the order, cannot be supposed to have known that the petitioner was a merchant. He, however, certainly knew it himself, and did not do all that was required of him by law, as conditions precedent to obtaining the privileges allowable to men in his situation, and without which they ought not to be allowed.

The original order itself, and all subsequent proceedings, might perhaps be considered as void, in consequence of this failure on the part of the debtor to disclose his situation as a merchant, and thus attempting to commit a fraud on the law, which may have been prejudicial to the rights and claims of his creditors.

The decision on the opposition, made in behalf of the absent creditors, although it may not be considered as having annulled all the proceedings previously had in the *concurso*, does deprive the ceding debtor of an important privilege, granted to honest insolvents; and the question is, whether this decision ought to be affirmed under the circumstances of the case. According to the laws, as they existed formerly in this state, fraud was to be presumed in cases of insolvency. These laws were repealed by the act of 1828; but the repeal of them, as laws absolutely obligatory in the administration of justice, ought not to destroy the force of principles which were established by them, when these principles are found to comport with justice, and may be considered as having been induced from rational and well founded opinions of the probable conduct of men in civil society. It is to be presumed, that a person of ordinary discretion, who becomes indebted to others, acquires property equivalent to the debts created by its aquisition, and probably lives in a style proportionate to his means, and when by accidental circumstances

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accounts, is bound to surrender and present to the judge all his commercial books, before the order is granted staying proceedings against him or his property, and calling a meeting of his creditors.

The repeal of general laws as regards their obligatory force in the administration of justice, ought not to destroy the force of principles which were established when they were in force, when those principles comport with natural justice, applied to the conduct of men.

**EASTERN DIST.** his means decrease, and he is obliged to make a surrender of all, for the benefit of his creditors, nothing can be imagined so well calculated to put to a severe trial his honesty and good faith. Some concealment may be supposed in

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In cases of insolvency and bankruptcy, fraud is presumed against the insolvent, and courts of justice should act on this principle when that presumption is supported by the evidence of facts which corroborate it.

to establish fraud, in the case now under consideration, have not been made out on a formal charge, verified by the verdict of a jury, according to the provisions of the act of 1817. But it must not be lost sight of, that they relate to neglect and omissions on the part of the insolvent, of things which he was bound by law to perform as prerequisites, in order to entitle him to the benefit and privileges of laws which provide for the relief of insolvents, and without the performance of which, these privileges ought not to be accorded to him, in their full extent; having failed to fulfil the conditions imposed on him, he is not entitled to the benefits granted as a special favor. That the conduct of the insolvent in the present instance, was not a consequence solely of

So, where the insolvent made a cession of his property, and prayed for the benefit of the insolvent laws, but withheld his commercial book or books of account: *Held,* that he is thereby debarred from any benefits or privileges provided by the laws, for the relief of insolvent debtors.

From these considerations we are of opinion, that the judgment of the District Court should be affirmed; which is accordingly ordered.

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**POULTNEY'S HEIRS vs. CECIL'S EXECUTOR.**

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

According to the *Civil Code* of 1808, no one could be compelled to accept a succession and assume the quality of heir; and, having accepted, might renounce, and even accept again, in some instances. Until such acceptance and renunciation, the inheritance was a fictitious being, representing in every respect the deceased. Before acceptance, the title of the heir is not vested: So, where the widow renounced the community, and no person claimed as heir for thirteen years, the estate was considered and held to be vacant. *Civil Code of 1808, art. 118, p. 172.*

The rules and forms prescribed for the alienation of minors' property as such, viz: that it can only be sold in pursuance of the advice of a family meeting, and for its *appraised value*, do not apply to property alienated by judicial authority, at the instance of creditors, and for the payment of debts which formed a charge on the estate; because the sale of property in which minors were interested, for the payment of debts, has always formed an exception to the rule.

Minor heirs, without acceptance, must be considered as strangers to the succession, which is in itself vacant, and not represented by an heir; consequently, the heirs are not entitled to citations and notices in the proceedings by the creditors to sell and distribute the property, in payment of the debts.

After the time for deliberation has elapsed, an alienation made fairly, by competent judicial authority, and for the payment of debts due by the deceased, and more especially mortgaged debts on the property alienated, will conclude the heirs who accept afterwards, with the benefit of inventory.

It is a settled principle that the retroactive effect of an acceptance, which is in truth but a *fiction*, should not be so extended as to operate to the prejudice of the rights of third persons, previously acquired.

Where a respite has been granted to a debtor, by his creditors, and he dies before the first instalment becomes due according to the terms of the respite, his estate will be considered insolvent, and the debts all due and

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demandable, notwithstanding the respite, if the estate is accepted with benefit of inventory.

According to the Spanish law, an estate not represented by an heir, might be provided with an administrator or curator, at the instance of creditors, with a view to administering it *in concurso*, for the benefit of all concerned.

It is only necessary to seek out and cite the heirs in a proceeding to administer an estate *in concurso*, to ascertain if they will accept or renounce the succession: and where the tutrix was present and renounced the community, and declined either accepting or renouncing for the minor heirs, whose rights were fully exercised by her, it was held, that no other citation or notice to them was necessary.

Under the *Civil Code* of 1808, the District Court had jurisdiction *ratione materiae*, of proceedings against a vacant estate, administered for the benefit of creditors, and could legally appoint administrators, curators or syndics to administer and dispose of the property of such estate, for the benefit of all interested therein.

In a petitory action, persons (as heirs) claiming the estate, are bound to make good their title against the legal possessor; and in opposition, the latter has a right to set up and prove by every legal means, any title which may defeat the claim of the plaintiffs.

The first purchaser cannot repudiate the title by which he has sold to his vendee; and the averment in a petition, by him, that the proceedings were null under which the title was first acquired, cannot avail third persons who were not parties to them.

The sheriff's deed and return upon the execution and judgment, furnish *prima facie* evidence of a valid alienation; and he who attacks it, must show that the forms of law were *not* complied with.

Mortgagees are not prohibited from bidding for and purchasing the mortgaged premises, when sold under execution.

Syndics may consent to the terms of sale of mortgaged property, that it be sold on a credit, and without appraisement; and such consent is binding on the heirs who afterwards claim the property, unless they show they were injured by it.

Where sales of property under execution, are regular, the rights of purchasers will be maintained, although the judgment is afterwards reversed for want of jurisdiction in the court by which it was rendered.

This is an action of revendication. The two minor children and heirs at law of the late John Poultney, by their mother and natural tutrix, instituted this suit on the 3d of December, 1832, to recover a large lot of ground situated in the now city of Lafayette, and which made part of the property of their deceased father at his death, and now in the possession of the defendant, William Cecil. The ground in controversy forms part of a plantation purchased by John Poultney, by public act, dated the 27th of May, 1818, from Madame Rousseau. This title is not disputed.

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The defendant pleaded the general issue; and that the plaintiffs never legally accepted their father's succession, and are not the owners of the property claimed by them. He avers he purchased it from Charles Harrod and Francis B. Ogden, by public act, dated the 30th June, 1824, who are bound to warrant his title and possession; he therefore calls them in warranty, and in case of eviction, prays judgment for damages over against them.

C. Harrod, in answer to the call in warranty, admits that he and his co-warrantor sold the property in question to the defendant, but denies the claim of the latter to damages, in case of eviction. He avers that by the original act by which Poultney acquired the property now claimed by his heirs, the firm of Harrod & Ogden, of which he is surviving partner, became endorsers of the notes given for the different instalments, amounting to eighty thousand dollars, and on condition that if they had to pay any of them, they should be subrogated to all the rights of the vendor; that Poultney failed to pay any of the instalments; that said firm paid the first instalment, and he has paid the remainder, and is now subrogated to all the rights of the vendor: he prays that if the proceeding be annulled under which he claims, that the sale be rescinded for the non-payment of the purchase money.

A curator *ad hoc* was appointed to represent Francis B. Ogden, called in as co-warrantor with C. Harrod, and who was shown to reside out of the state. His interest and defence is the same as that of his co-warrantor. Upon these pleadings the parties went to trial.

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The facts of the case, as shown by the evidence, are as follow: John Poultney purchased the plantation of Madame Rousseau, for one hundred thousand dollars, of which twenty thousand dollars were paid in cash, the balance in five equal instalments, payable in one, two, three, four and five years, for which notes were given to the order, and endorsed by Harrod & Ogden. On the 26th of April, 1819, Poultney finding himself in embarrassed circumstances, applied to the District Court for a stay of proceedings and call of his creditors, to deliberate on his affairs, with a view to granting him a respite. A meeting was accordingly ordered, by which a respite of one, two and three years was accorded for the payment of his debts contracted up to that time. Harrod & Ogen appeared at the meeting and voted for the respite for an ordinary debt of two thousand dollars, and on the first instalment of sixteen thousand dollars, for which they had endorsed the note and taken it up. The schedule of Poultney presents assets to the amount of two hundred and thirty-seven thousand nine hundred and twenty-one dollars, and debts owing, to the amount of two hundred and seven thousand two hundred and ninety-five dollars. In presenting this statement to his creditors, he says that there are abundant means to pay his debts with good management, and some indulgence.

On the 23d of October, 1819, Poultney died, leaving a widow and two minor children; and on the 25th, two days after, the seals were affixed on his effects. On the 11th December, 1819, an inventory of the effects of the succession was made, at the instance and on the petition of the widow, assisted by A. L. Duncan and J. R. Grymes, Esqs., her counsellors and attorneys at law; and on the 26th of January, 1820, the widow made a formal renunciation of the community, before a notary, by authentic act.

On the 11th February, 1820, Lloyd & Harrison and other creditors of Poultney, filed a petition in the District Court, alleging his death, their belief of the insolvency of his estate, that his widow had renounced the community, and that there was no person legally authorised to administer it; they

prayed for a meeting of creditors to take into consideration the affairs of the succession, for the purpose of naming syndics to administer the same. A meeting was accordingly ordered, and held on the 13th of March, George Lloyd, Henry Foster and P. V. Ogden were appointed syndics. The proceedings of the creditors were brought into court on the 22d of March. On the 4th of April, on the petition of Lloyd, Foster and Ogden, they were authorised by an order of court to take possession of the property and sell it according to law. On the 24th of April the syndics presented another petition, stating that Poultney died possessed of certain real estate, among which *was that now in dispute*, including the plantation purchased from Madame Rousseau, and that it was subject to a mortgage for eighty thousand dollars, sixteen thousand dollars of which had been due since the month of May, 1819; they pray that they may be authorised to sell the same for the purpose of paying the mortgages on such terms and conditions as the court may direct. On filing this petition the court ordered that the creditors and all others interested, show cause on the 6th of May, why the real property belonging to the succession, should not be sold according to the petition.

No further action appears to have taken place on this rule. It does not appear that the widow or minor children of Poultney in any way interfered or were made parties to these proceedings. But two powers of attorney are in evidence; one dated in 1821, and the other in 1823, in which the widow Poultney *in her own behalf*, and as tutrix of her minor children, joins with the syndics of Poultney's estate, and they appoint attorneys in fact, with full power "to ask, demand and receive in their name, all *inheritances, legacies, shares or claims* which may in any way devolve or come to either of them, or to the succession of the late John Poultney, &c."

On the 9th May, 1820, Charles Harrod, George M. Ogden and Peter V. Ogden, presented their petition to the District Court, stating the purchase of the plantation from Madame Rousseau by Poultney; that the property had been specially

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mortgaged to secure the payment of the notes which had been endorsed by them, and that by the act of sale, it was stipulated that, in case they, the endorsers should be obliged to pay said notes, they should be subrogated to the mortgage, and to all the rights of the seller. That the first of the notes had been protested and paid by them, and the second would become due in a few days, when they would be called upon to pay it. They pray for an order of seizure and sale of the property, for so much of cash as will pay the amount of the two first instalments of sixteen thousand dollars each, the necessary costs and expenses; and that the other payments may be made to coincide with the periods at which the other three notes shall respectively fall due. That George Lloyd, Peter V. Ogden and Henry Foster, be cited to answer the petition. The following order is given and signed by the judge: "It is ordered that the mortgaged property in the petition mentioned, or so much thereof as may be sufficient to satisfy the petitioners' demand, be seized and sold according to law. May 8, 1820." On the following day an order of seizure issued, directed to the sheriff, commanding him to sell the mortgaged property, or so much thereof as will pay and satisfy the plaintiffs' demand of thirty-two thousand dollars, interest and costs. On the 31st May, 1820, a document is filed, dated 29th May, 1820, signed by Harrod & Ogden, by G. M. Ogden and by the syndics, consenting that the property seized and advertised should be sold, subject to three notes secured by mortgage, and payable at the following dates, viz: one note payable 30th May, 1821, for sixteen thousand dollars; one note payable 30th May, 1822, for sixteen thousand dollars; one note payable 30th May, 1823, for sixteen thousand dollars; amounting together to forty-eight thousand dollars, the balance of the purchase money payable in cash, without appraisement. On the same day the judge orders a sale to be made in conformity with the agreement. On the order of seizure, the sheriff returns that he served writ, copy of petition and notice to pay in three days on Mr. Lloyd, one of the defendants. May 10, 1820. That on the 13th June, 1820, he sold the

property to George M. Ogden, payable pursuant to an order of court, for forty-eight thousand dollars, one-third on 30th May, 1821, one-third on 30th May, 1822, and one-third on 30th May, 1823, being the amount due to widow Rousseau, and twenty-one thousand dollars in cash. This return is not made until 18th June, 1823. The citation to Lloyd, Ogden and Foster, is to appear and answer in ten days after service, which is made on Lloyd only, on 9th May. On the 10th March, 1823, judgment by default is entered on a motion of counsel for plaintiffs. On the 29th March, 1823, judgment by default is confirmed on first note of sixteen thousand dollars. The sheriff, in the deed of sale, conveys the interest of John Poultney, junior, without any reference to that of the heirs.

On the 16th January, 1824, Charles Harrod and the heirs and representatives of George M. Ogden, filed a petition in the Court of Probates, praying for an order of seizure and sale of the property purchased by Poultney from Madame Rousseau, to pay the amount of three of the notes given as part of the purchase money thereof, and which they, as endorsers, had been compelled to take up. They state the death of Poultney, leaving his widow and two children, Matilda and Emily, both minors; that the widow had renounced, that she was the natural tutrix of the minors. They pray that she be cited as tutrix of the minors, to answer, and in that capacity be decreed to pay the sum of forty-eight thousand dollars, and that in the meantime the mortgaged premises be seized and sold. Francis B. Ogden, one of the plaintiffs, swears to the truth of the allegations of the petition, and that the *heirs* of John Poultney, named in the petition, are justly indebted in the sum of forty-eight thousand dollars. One of the notes referred to in the petition is that for the first instalment, and the same on which the order of seizure and sale had issued in the District Court. On the 17th January, the following order is made and signed by the judge: "Let the defendant be cited to answer the within petition, and in the meantime let the mortgaged premises be seized and sold by the sheriff according to law."

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A citation issued in the ordinary form to Mrs. Poultney, to appear and answer to the petition in ten days after service. On the citation the sheriff makes the following return: "Served copy of petition and citation and also of the within order on the widow Poultney, by leaving the same with John R. Grymes, her attorney. January 26, 1824." On the 22d January, an order of seizure and sale issued, directed to the sheriff, commanding him to seize and sell the property described in the petition. The sheriff returns, that he had seized the property, and that on the 23d day of February, 1824, sold sundry lots for seven thousand nine hundred and sixty dollars to different individuals who had become the purchasers of them on the 25th and 26th of June, 1822; having exposed the remainder of the plantation according to law, Charles Harrod and F. B. Ogden became the purchasers thereof, for the price of twenty-seven thousand dollars. On the 27th February, 1824, a judgment by default is entered on motion of attorney of plaintiffs. The notes sued on were not filed with the petition, nor were they produced in court until 5th March, when a motion was made to compel the recorder of mortgages to produce two of them. On the 15th March, final judgment for forty-eight thousand dollars, with interest, was rendered against Mrs. Poultney, as tutrix of her minor children, Matilda and Emily.

On the 13th May, 1824, Francis B. Ogden and Charles Harrod presented a petition to the District Court, stating the proceedings in the suit of Harrod & Ogden *vs.* the syndics of Poultney, in that court, and the sale of the plantation, under order of seizure and sale, to George M. Ogden. They allege that said sale was a mere nullity, having been granted by a court having no jurisdiction, and that George M. Ogden acquired no title thereby, and that the mortgage granted by him was merely void. They state their purchase at sale under order of Court of Probates, and pray that G. W. Morgan, sheriff, be cited to show cause why he should not raise said mortgage. The sheriff, in his answer, admits the allegation in the petition; the judge ordered that the mortgage be raised, the sale having been made without any legal authority.

The foregoing statement embraces all the proceedings, as shown by the evidence, in relation to the administration and disposition of Poultney's succession. The defendant, Wm. Cecil, purchased a large square in the Rousseau plantation, which had been laid off into lots, from Charles Harrod and Francis B. Ogden, by public act, passed before Carlile Pollock, notary public, dated the 30th of June, 1824. This lot or square, forms the subject of contestation, in this suit. Cecil died before judgment, and the suit was continued against C. Harrod, his executor.

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On the 26th November, 1832, previous to filing this suit, the widow Poultney applied, and was confirmed in the office of tutrix to her minor children, and took the oath. On the 21st of January, after the institution of this suit, she presented a petition, stating, she believed it would be for the interest of the minors, to accept the succession of their deceased father, with the benefit of inventory, and prayed for a family meeting to deliberate thereon. On the 15th of March, a family meeting was held, who declared that it would be for the benefit of the minors, to accept with the benefit of inventory, and the proceedings were homologated. On the 3d of April, 1833, an inventory of Poultney's estate was taken, comprising the property now in dispute.

One of the minors having died since the institution of the suit, her succession was accepted by her surviving sister, and by her mother. The sister consequently claims seven-eighths and the mother one-eighth of the property in contest.

The cause was submitted to a jury, on an elaborate charge to them, by the district judge presiding. The jury returned a verdict for the defendant. A motion was made to obtain a new trial, which was overruled, and judgment rendered in conformity to the verdict. The plaintiffs appealed.

*Grymes and J. Slidell*, for the plaintiffs, made the following points:

1. The defendants claim under a title derived from the ancestor of the plaintiffs. They consequently cannot contest its validity, nor set up an outstanding title with which they

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do not connect themselves. The burden of the proof is with them to show, that the title of the ancestor has been legally divested. *Verret's Heirs vs. Candolle* 4, *Martin, N. S.*, 402. *Trahan vs. McManus*, 2 *Louisiana Reports*, 209. *Bedford's Heirs vs. Urquhart, ante*, 241.

2. The acceptance of the inheritance by the heirs has a retroactive effect; they are considered as having taken possession of the estate at the time of their father's decease. *Old Civil Code, page 160, article 72, 73.* Their right to the property could only have been divested by lawful acts done with the administrator or curator of the vacant estate. *Old Civil Code, page 164, article 95.*

3. The District Court was without jurisdiction of any claims for debt against the estate of deceased persons. The Court of Probates had exclusive jurisdiction of such claims. *Vignaud vs. Tournacourt's Curator*, 12 *Martin*, 229. *Cox vs. Martin's Heirs*, 12 *Ibid.*, 361. *Old Civil Code, page 178, article 137.* *Waters vs. Wilson*, 3 *Martin, N. S.*, 137. *Debuys vs. Yerby*, 1 *Ibid., N. S.*, 380. *Baillio vs. Wilson*, 3 *Ibid., N. S.*, 72. *Wilson vs. Baillio*, 3 *Ibid., N. S.*, 74. *Lafon's Executors vs. Phillips*, 2 *Ibid., N. S.*, 230. *De Ende vs. Moore*, 2 *Ibid., N. S.*, 337. *McDonough vs. Johnson's Executors*, 2 *Ibid., N. S.* 287. *Miles vs. Ford*, 2 *Ibid., N. S.*, 439. *Flood vs. Shaumburg*, 3 *Ibid., N. S.*, 625.

4. No forced surrender could be had of the estate of a deceased person on the suggestion of its insolvency. It could only be administered by the Court of Probates after the act of 1820. *Dupuy vs. Griffin*, 1 *Martin, N. S.*, 198. *Jenkins vs. Tyler*, 3 *Ibid., N. S.*, 182.

5. Even if the District Court could have exercised jurisdiction and a forced surrender could have been had at the instance of creditors, the proceedings are null and void as against the heirs of Poultnay, because they were not cited nor in any manner made parties thereto. Where there is no citation, the nullity is absolute. *Weimprender's Syndics vs. Weimprender*, 11 *Martin*, 17. *Guilot vs. His Creditors*, 12 *Ibid.*, 654. *Bernard vs. Vignaud*, 1 *Ibid., N. S.*, 1. *Cochrane vs. Smith*, 2 *Ibid., N. S.*, 553. *McMicken vs. Smith*, 5 *Ibid., N. S.*, 427. *Love vs. Dickson*, 7 *Ibid., N. S.*, 161.

*Marchand vs. Gracie*, 2 *Louisiana Reports*, 148. *Curia Philippica*, page 66. *Febrero*, vol. 6, 50, 57, article 145, page 483.

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6. No order of seizure and sale could issue until the act importing confession of judgment had been declared executory against the heirs. *Old Civil Code*, page 200, article 229. *Ibid.*, 490 article 7.

7. The order of seizure and sale issued irregularly, because the plaintiffs had no right to demand a sale for an amount greater than that of the note actually paid by them or of which they were in possession.

8. Peter V. Ogden was both plaintiff and defendant in the suit; where a party sues himself there can be no *contestationis litiis*.

9. The petition prayed for a citation to the syndics in the ordinary form, and asked judgment; this was an abandonment of the *via executiva*, and the order of seizure was improperly issued. *Gurlie vs. Coquet*, 3 *Martin, N. S.*, 500. *Weimprender vs Fleming*, 8 *Ibid.*, *N. S.*, 96.

10. The property was not advertised according to law. The order of the judge, fixing the terms of sale, bears date the 31st May, and the sale was made by the sheriff on the 13th June. Thirty days' advertisement is prescribed by law; no appraisement was made; the consent of the syndics cannot cure the defect of a formality prescribed by law for the benefit of all debtors, even of full age. *Old Civil Code*, page 490, article 3.

11. If the appointment of syndics was regular, the property should have been sold by them under the provisions of the insolvent laws. *Act of 1817*, page 140, section 30. *Ibid.*, page 142, section 37. An order of seizure and sale could not issue. *Chiapella vs. Lanuse's Syndics*, 10 *Martin*, 448.

12. By the terms of the respite granted by the creditors of Poultnay and homologated by the court, and to which Harrod and Ogdens had given their express assent, no portion of the debt due on the purchase from Mad. Rousseau was exigible at the period when the order of seizure was obtained. Madame Rousseau although a mortgage creditor would have been bound by it. *Old Civil Code*, page 440, article 6.

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7 Febrero, page 116, No. 132. Harrod and Ogden were bound by their own act granting a respite on the very note on which their order of seizure and sale was obtained.

13. George M. Ogden as seizing creditor could not purchase the property sold for the payment of his debt. 6 Febrero, page 494, Nos. 344, 345. *Curia Philippica*, page 161, No. 24. *Ibid.*, page 163 No. 23.

14. The bill of sale of the sheriff under the proceedings in the District Court only conveys the interest of J. Poultney, junior, not that of his heirs. But even if a good title had been vested in G. M. Ogden, the defendant not claiming under him cannot avail himself of it. *Bedford's heirs vs. Urquhart, ante*, 241.

15. G. M. Ogden never complied with the terms of adjudication. His heirs and representatives joined in a suit in the Court of Probates, in which the property said to have been purchased by him was seized and sold four years after as the property of the heirs of Poultney. Charles Harrod and Francis B. Ogden were both parties to this suit; the defendants claiming under them are bound by their acts and declarations.

16. The defendants claiming under Harrod and Ogden are precluded by their proceedings in the District Court against G. W. Morgan, in which the sale is treated as a nullity, and a judgment rendered in conformity with their allegations.

17. The creditors of Poultney were not debarred from proceeding against his succession before the Court of Probates, by the inaction of the tutrix. They could have called upon the minors to accept the succession or renounce, and in the event of renunciation have caused an administrator to be appointed by the proper tribunal. *Curia Philippica* page 56, No 11, article 167; 6 Febrero, page 65. Or if syndics were to have been appointed, it should have been by the Probate Court.

18. The proceedings in the Probate Court are null and void; because the act of mortgage had not been declared executory against the heirs, and because they were not cited;

see authorities quoted in fifth and sixth points, and further, for the reasons mentioned in the seventh and eighth points.

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19. The return of the sheriff of service of citation on John R. Grymes, as attorney, is not even *prima facie* evidence of his authority. *L'Eglise vs. His Creditors*, 4 Martin, N. S., 238. *Skillman vs. Jones*, 3 Ibid., N. S., 686. *Smith vs. Winbush*, 3 Louisiana Reports, 442. *Holliday vs. M'Cullough*, 3 Martin, N. S., 177. But if the return of the sheriff were *prima facie* evidence of the authority, it may be disproved by the affidavit of the party. *Dangerfield's Executors vs. Thurston's*, 8 Martin, N. S., 235.

20. If the return of the sheriff be good evidence of authority of attorney and the citation sufficient, still the sale is a nullity, because the service was made on the 26th January, and the sale took place on the 23d February, not leaving time for the thirty days' advertisement required by law.

21. A forced alienation, if all forms of law be not complied with, conveys no title to the purchaser. *Dufour vs. Camfranc*, 11 Martin, 607. *Johnston's Executors vs. Wall*, 1 Ibid., N. S., 545. *Mayfield vs. Cormier*, 8 Ibid., N. S., 247. *Delogny vs. Smith*, 3 Louisiana Reports, 418. *Thompson vs. Rodgers*, 4 Ibid., 10. *Grant and Olden vs. Walden*, 6 Ibid., 623.

22. The rights of the minors cannot be prejudiced by the neglect or omissions of their tutrix. Any deviation from the forms prescribed by law for the alienation of the property of minors, is fatal and the sale a nullity. *Chesnau's Heirs vs. Sadler*, 10 Martin, 726. *Gayoso de Lemos vs. Garcia*, 1 Ibid., N. S., 324. *Elliot vs. Labarre*, 2 Louisiana Reports, 328. *Donaldson vs. Dorsey's Syndics*, 5 Martin, N. S., 655. *Fletcher's Heirs vs. Cavalier*, 4 Louisiana Reports, 270. *Delahousaye vs. Dumartrait*, 4 Ibid., 370.

23. The court erred in refusing to charge the jury as required by the plaintiffs, on the several points stated in the written charge.

*Preston*, for the defendant.

On the 27th day of May, 1818, John Poultnay purchased a plantation above the city of New-Orleans, from Mrs.

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Rousseau, for the price of one hundred thousand dollars ; she acknowledged the receipt of twenty thousand dollars, and Poultnay gave his notes, with Messrs. Harrod & Ogden, as endorsers, at one, two, three, four and five years, for sixteen thousand dollars each, for the balance of the price stipulated.

On the 26th of April, 1819, when the first instalment was becoming due, John Poultnay petitioned the District Court for a respite. He was in debt at that time, according to his schedule, (verified by his oath) in the sum of two hundred and seven thousand three hundred and fifty dollars ninety-one cents, due by him personally ; and in liabilities to the amount of about fifty thousand dollars more.

To pay which, he exhibited property and debts due to him ; which property, at his own estimation, and calculating all the debts, good, doubtful and bad, amounted to two hundred and thirty-seven thousand nine hundred and twenty-one dollars twelve cents. A respite of one, two and three years was accorded to him by his creditors, which was homologated by the judgment of the District Court, on the 28th of June, 1819 ; but this load of debt soon crushed him, and he died on the 23d of October, 1819. His succession was opened in the Court of Probates of the city of New-Orleans, by his widow.

An inventory of his succession was made by authority of the court, and his widow, knowing that his property would not pay his debts, renounced the community of acquests, on the 25th of January, 1820. She did not even apply for the administration of the succession, which she might have claimed, being the natural tutrix of her children.

So great were the debts, so insolvent was the succession, that she abandoned it, reserving her dotal rights as a creditor, making a claim against his estate, which Poultnay had not mentioned, and thus showing, what is nearly always the case, that the estate was more desperate than represented by the insolvent himself.

Had she not have intentionally abandoned it, as tutrix of her minor children, she would have called a family meeting, in pursuance of *articles 62 and 63, page 70 of the Civil Code,*

and with their advice and the authority of the judge, have accepted it for her children, with the benefit of an inventory.

But would any family meeting of the relations and friends of Mrs. Poultnay and her children, have advised her to take the administration for her children, even with the benefit of inventory of such a succession ?

It would have occurred to any family meeting, that the plantation and other real property were mortgaged for more than what they could be sold for. The balance of the effects of the succession were mercantile claims, scattered to the four winds of the heavens, and of the whole, by any reasonable calculation, not one hundred thousand dollars could have been realized.

At least two hundred and fifty thousand dollars was to have been paid, debts certain, liquidated and acknowledged by Poultnay himself, to be pressed with all the unceasing assiduity of grasping, suffering creditors, whose debts were in imminent danger of being lost.

Deliberating on such a case, every relation, every friend of the mother and children, would unhesitatingly have said, renounce this desperate succession on behalf of your children as well as yourself; the most skilful management, so far from saving any thing for them, would not enable you to pay the creditors fifty cents in the dollar. You are not obliged even on behalf of your children, to administer for your husband's creditors.

You are a woman, not even noviciated in business. This insolvent, entangled, desperate succession, would involve you in a labyrinth which men of business could scarcely unravel : there are one hundred creditors, not only distressed for the want of their money, but alarmed lest they should lose it ; each one will harass you continually ; besides those, the whole tribe of marshals, sheriffs, dunners and constables, will infest your domicil from morning till night. You will not be able to sleep at night, for the new troubles each day will bring forth : this load of debt and trouble brought your late husband to his grave, and you will quickly follow him, if you assume so weighty a responsibility : yet,

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for your children, it would be a sacred duty to undertake the task ; but that is entirely hopeless : it is absolutely certain that you cannot save a dollar for your children.

Besides, there is a great responsibility : every thing must be accounted for according to law, each one must be paid, wholly or in part, proportionately as the law directs. And yet the lawyers and judges differ as to the law, and even as to the court in which the business is to be done ; and, of course, much more as to the manner of doing it. This responsibility will greatly endanger the patrimony you and your children may have, separate from your deceased husband's and their father's misfortunes. You are connected with a wealthy family ; yourself and children have expectations ; mingle not these with those which cannot produce gain, and may entail ruin.

Such considerations induced Messrs. Duncan and Grymes, her friends and counsellors, to advise her to, and aid her in renouncing for herself, which she could do without much form, and from the fact that a family meeting was not assembled. As to the children, we are bound to believe that it was so manifestly her duty to abandon the inheritance, in her own view, and that of all her friends, that it was unnecessary even to go through the formality, and incur the expense of calling a family meeting, and making formal renunciation for her children. All, by common consent, abandoned the insolvent succession.

But the law at the time, prescribed the acceptance in form as a mode of acquiring property, and without it, the property, did not belong to the heir ; indeed he is not heir. *Cresse vs. Marigny, 4 Martin, 57. Febrero Juicios, page 100, Nos. 109, 110, 111.* The law required the acceptance in form, by notarial act or judicial proceedings, as a condition on which the property should belong to the heir. The object was, in case he accepted, purely that his obligation to pay all the debts should appear of record ; and in case he accepted with benefit of inventory, (in which form alone a minor could accept) that he might appear what he really

was, *only the administrator of the property*, until all the debts were paid. The heirs in this case, did not thus become the administrators of this property, because it was manifest to their tutrix and all friends, that they could have no interest in it. They did not, therefore, accept with the benefit of inventory, merely to administer for creditors whom it would be impossible to pay.

Thus, Poultney had died insolvent, his widow had renounced his succession, and had not accepted it for her children. Under article 62 page 170 of the old *Code*, she could not be compelled to accept it for them, for in the words of that code, "no body can be compelled to accept a succession in whatever manner it may have fallen to him, whether by testament or operation of law." *Old Code*, page 161, *article 71*.

"But, until the acceptance or renunciation, the inheritance is considered a fictitious being, representing in every respect, the deceased, who was owner of the estate." *Page 164, article 74.*

The estate of Poultney being thus abandoned by his widow and heirs, who were interested in it? The creditors alone. For example, the widow Rousseau owned eighty thousand dollars in the plantation. It is true, the heirs of Poultney purported to have an interest of twenty thousand dollars, or one-fifth part. But this, probably, was raised by transferring notes which belonged to his mercantile business, and which were necessary to settle that, or by giving out accommodation notes; otherwise he would not have been so entirely insolvent. Even if he had actually paid cash, which he was worth, independent of his business, it was paid, coupled with an obligation to pay sixteen thousand dollars per annum, for five years, in order to own the land. This he could not do. The plantation could only be sold on terms, after the greatest publicity, for sixty-nine thousand dollars; and that to the creditors themselves who held Poultney's paper, and had no other means of getting paid. None of the wealthy friends of these minors came forward to offer as much, and it crushed the creditors who gave that

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sum for it. For every person who had any connexion with this then immense contract, were swept by it from the list of merchants and moneyed men ; Poultny, Torry, the Ogdens, Harrod and others, all failed.

We had then no coffee-house speculators in lots ; we had but the Bank of Orleans, the capital of which would but little more than have paid Poultny's debts, and the Louisiana and Planters' Bank, which were insolvent.

Men dealt in but a few hundreds at that period, and for a small revenue ; dealers in thousands were scarcely known ; extended commerce, increased population and wealth, and the multiplication of banks, have run property up one thousand per cent. since that period. Thus the property of Madame Livaudais was run up in two years, from one hundred thousand dollars, which she asked for it, to nearly one million of dollars.

The creditors, therefore, were interested in this fictitious being, representing in every respect, John Poultny, their debtor. *Old Code*, 162, article 74. They were now to decide what course was to be pursued.

The estate of Poultny was, in the very words of the old Code, a vacant estate, which is thus defined, article 118, page 172 : " An estate is said to be vacant, when no person claims its possession, either as heir or under any other title ; " and the Probate Court might have appointed a curator to administer it. But no curator was appointed, no creditor would apply for, or could be compelled to take the curatorship, on account of the immense security which would have been required, amounting to at least two hundred and seven thousand dollars, besides a tacit mortgage on all the curator's property. *Old Code*, page 176, articles 134, 135.

The case did not exist for the application of the article 33, page 84, of the old Code, because the heirs, who had a right to succeed, had not renounced the succession. And even if the article applied, no curator could be appointed, because none would apply, being obliged to give security like other curators.

For the same reason, the beneficiary heirs did not apply to the Probate Court, for the administration of the estate, and it is clear they could not be compelled to do so, for the same security would have been required of them. *Old Code*, page 168, article 107.

They could not have given it, and the estate being entirely insolvent, they had no motive, not even that of commissions for administration, which were prohibited by law, (*old Code*, page 170, article 116) besides the incumbrance of a tacit mortgage on their property.

In these modes, jurisdiction of Poultney's estate might have been given to the Probate Court; they were not resorted to, and no power could have compelled a resort to them.

Were the creditors, therefore, remediless? Surely not; for if there had been no provision of law, pointing out the course they were to pursue, the District Court, being one of general jurisdiction, obliged to afford redress in all cases, would have been obliged to take cognizance of this case, under article 21, page 6, of the old Code, which provides, that in "civil matters, where there is no express law, the judge is *bound to proceed*, and decide according to equity."

To this clause of our Civil Code, I have ever thought our courts have attached too little importance. It is the foundation of all equity in Louisiana, and from necessity equitable power must exist here, as well as in all other countries. The provisions of our very summary Code, can extend to but few of the innumerable and infinitely varied controversies of men. In such cases, the judiciary are, and should so consider themselves, the great dispensators of the public justice of the state, and should not deny relief because a provision of law cannot be found, affording it in the very case; but for want of the provision should appeal to their consciences for the injunctions of equity.

The utmost that can be said, is that Poultney's succession presented a case for which the old Civil Code did not provide. It was abandoned by his *widow in community*. The heirs had not accepted purely, nor with the *benefit of*

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*inventory.* No creditor had applied for the curatorship. It was absolutely abandoned and belonged to the creditors. *Old Code, page 468, article 67.* "The property of the debtor is the common pledge of his creditors." They applied to the District Court for relief, for an administration by which it might be appropriated to their claims. That court could not equitably resist their application, and what better course could possibly be pursued in the absence of all law, than to order all those interested in the property to meet together, and under the control of the court, to appoint administrators to administer it, for the benefit of all concerned.

The judge of the District Court, on the petition of creditors, presented by the ablest and most experienced *counsel* at the bar, and who advised disinterestedly, because the interest of the creditors and minor heirs of Poultney did not conflict at all, as it was mere matter of administration, ordered this course. In doing so, we contend that he had no occasion to resort to his general equitable powers, but that being the only court competent to afford relief in the case, he followed the express provisions of law made for the very case. The District was the only court that could order a *concurso* of the creditors of the succession; no such power belonged to the (at that period) extremely limited jurisdiction of the Probate Court, and a *concurso* of creditors was the only proper remedy for the case, and was expressly provided for by the laws in force at that time.

"*El segundo género de concurso es el que se causa y promueve por los mismos acreedores, sin que los convoque, ni á el concurra el comun deudor, sino antes bien con total independencia suya, v. g. cuando por haber muerto presentan sus créditos en el juicio de su testamentario, y cada uno solicita la prelacion del suyo en el pago.*"

The second kind of *concurso* is that which is caused and provoked by the creditors themselves, without the common debtor calling them together, or even being present at the meeting, but rather entirely independently of him, for example, when the debtor having died, his creditors present themselves in the court, having jurisdiction of his succession, and demand their privileges in the payment of their debts.

*"Este se llama concurso necesario y con propiedad pleyto y ocurrencia de acreedores."* And the author, in distinguishing it from the voluntary *concurso*, inform us. *"que cuando se forma por muerte, y se ignora que acreedores tiene, se debe nombrar de oficio (defensor) y llamarlos por edictos, y así se practica."* *Febrero, part. 2. lib 3, chap. 3, sec. 3 No. 39, 40.*

This is called the forced *concurso*, and with propriety the suit or assembly of creditors; and when it is formed in consequence of the death of the debtor, and it cannot be known what creditors there are, the court should name a defensor, and call the creditors by advertisement, which is the practice.

The practice thus prescribed, is precisely that which was pursued in Poultney's succession.

The succession of Poultney not having been accepted by his heirs, was abandoned, and by the Spanish and Roman Code, and laws of Louisiana, was subject to administration under authority of justice, by others than the heirs.

By the laws of Spain, which were in force when Poultney's succession was opened, his heirs were obliged to demand of the judge, the delivery of its possession *and property*. 6 *Partidas, title 44, laws 1, 2.* "Whether they claim it by will or relationship, such delivery (says the law) is very advantageous to the heir, for when it is legally made he *immediately acquires* the property of the estate."

"A minor under seven years of age, cannot of his own authority take *and acquire* the succession, but they who have him under their guardianship, may enter upon it in his name, if they think it is to his advantage to do so." 6 *Partidas, title 6, law 13.*

"A minor under fourteen years of age, *cannot acquire* an estate without the consent of his guardian, and if he has none, of the judge. If he be over fourteen years of age, he may of his own authority, enter upon and *acquire the estate*; but if after he has taken possession of it, he should discover that it was not to his advantage to retain it, he may change his mind and abandon it." Our old Code essentially accorded with these principles of the Roman and Spanish law. I

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contend that the heirs of Poultney *never acquired* his succession, since acts were necessary to acquire it, which acts were never performed.

By inaction it was abandoned, not renounced; for if once legally renounced, it could not afterwards be accepted by an heir of age, nor re-claimed even by a minor, except by proving that he had renounced it *to his prejudice*. 6 *Partidas, title 6, law 13.*

The succession never *having been acquired* by the heirs of Poultney, being abandoned, can there be a doubt that the creditors to whom it in reality belonged, had a right by judicial authority to take possession of it, have an administrator appointed, and establish and satisfy, as far as possible, their claims, contradictorily with him?

If the minor who had accepted, should afterwards change his mind and abandon the property, the creditors would certainly have this right, because the judge was bound to authorise him to abandon in presence of the creditors of the estate, plainly implying that the administration then belonged to them, they alone being interested. 6 *Partidas, title 19, law 7.*

Now in principle, what difference is there between property abandoned by non-acceptance, and that which after acceptance is abandoned. In either case the property is to be administered for the benefit of the creditors, to whom it essentially belongs.

Property abandoned, because the heirs do not accept, is analogous to that which the debtor himself abandons, and one general mode is provided for the administration of property abandoned, by the 5 *Partidas, title 15, law 2.*

The *hereditas jacens* of the Roman law cannot be better defined, than by our definition of a vacant estate: "An inheritance of which no person claims the posesssion, *either as an heir or under any other title.*"

Now to the *hereditati jacenti*, the judge was bound to appoint a curator, which I will show, differs in nothing but the name from a syndic. *Digest, book 3, title 5, law 13. Curator datur hereditati jacenti.*

*Hereditas jacens interdum loco domini habeter. Digest, book 2, title 1, law 15.*

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The principles and practice in case of abandoned property, or that to which an administrator is wanting, are fully treated by Salgado, an eminent commentator on Roman and Spanish law. He informs us, "that when estates by any accident, want an administrator, they fall under the protection of the competent judge, because he must take care of them and put them out of danger, lest they may be lost or dissipated, and for that purpose it is his duty to appoint to the estates themselves, a faithful keeper, administrator and tutor, so that he may administer them faithfully."

"It is always in the province of the judge, to appoint a curator to the estate of an absent person or to a vacant succession, lest it be dissipated or lost. He must do it *ex-officio*, no body demanding it, if the danger of wasting comes to his knowledge.

"One thing, nevertheless, is to be considered, that the curator appointed to the property of the debtor, is sometimes called defensor, sometimes administrator; no difference is made between them, because the doctors use indifferently these names.

"In the kingdom of Spain, he is generally named administrator, and not without reason, when the concourse of creditors mentioned, receive the administration of the property which is sequestered in their hands."

"Nevertheless, with respect to the appointment of the administrator for the property surrendered, it must be remarked what the judge must have always in mind, that the will and consent of the creditors must be followed, and if all or the majority of them have elected an administrator, he must approve and confirm him, because it is for their advantage and their utility that an administrator is elected and appointed to the property surrendered to them, and that it is principally for their interest that the property may be in safety, that it may be faithfully administered and meanwhile preserved to them, so that they may be all paid faithfully their credits."

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From these authorities and many others, in the same and other authors, I infer:

1. That a vacant estate was to be provided with *an administrator* when no person applied to the Probate Court for the curatorship, on giving security.

2. That the judge, in the appointment, was to be governed by the will of the creditors, *in concurso*, for whose benefit the administrator was to be appointed.

3. That the administrator was indifferently called curator, administrator, defensor and syndic, the name being nothing, his office under the judge every thing. Even under the old Code, the administrator was indifferently a curator, syndic or assignee, his business being the management of the estate.

*Page 84, article 34.*

Now, in 1820, our Court of Probates had by express law, power to grant the administration of estates to executors, to heirs with the benefit of inventory, and to curators who would apply for the administration on giving security; but the law cannot be found, which gave them power to order a meeting of creditors to appoint a syndic. That power was for the first time given to the Courts of Probate, by the act of 29th March, 1826, page 142. They had no power to administer an estate, which, like Poultney's, was so much in debt that no person would accept the curatorship, until that power was expressly given by article 1178 of the new Civil Code, and yet the administration of such estates, by syndics appointed by the creditors, was a common and known practice, or it would not have been abolished by article 1166 of the New Code.

The Court of Probates, thus, in 1820, being a court of limited jurisdiction, without power to order a concourse of creditors, or to administer a succession, where no person would apply for the curatorship; were the creditors of John Poultney without remedy, because his beneficiary heirs would not apply for the administration, and no person would accept the curatorship? They were not. The District Court, I will proceed to show, was a court of unlimited jurisdiction, and had not only power to afford them relief, but the

exclusive jurisdiction in the case presented by Poultney's succession.

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That court was created by an act approved the 10th February, 1813. It was organised and the jurisdiction given in these words: "There shall be a court in each parish, to be held, except for the parishes composing the first district, at such times as shall be hereafter provided for the trial of all civil cases which may arise in the said parish, without appeal, for any amount under the sum of three hundred dollars, exclusive of costs, to consist of one judge, learned in the law, for each district, who shall reside in the same." 2. *Martin's Digest*, page 188.

It is further provided, that "the proceedings of the said District Court, in civil as well as criminal cases, shall be governed by the acts of the territorial legislature, regulating the proceedings of the late Superior Court of the Territory of Orleans, and that they shall have the same powers, when not inconsistent with this act, which were granted to the said Superior Court by the said act." 2 *Martin's Digest*, page 193.

The Superior Court was created by act of Congress, approved the 26th of March, 1804, which gave to it, "original and appellate jurisdiction, in all cases of the value of one hundred dollars." 1 *Martin's Digest*, page 144. The act of the territorial legislature, regulating its practice, directed, "that all suits in the Superior Court shall be commenced by petition, and shall conclude with a prayer for relief, adapted to the circumstances of the case." The territorial legislature did not and could not take any thing from the powers of this court, which were given by act of Congress.

On the contrary, by the act of the legislative council of the 2d of February, 1805, the said court was directed to hold its sessions "for the trial of all suits and causes in law and equity, of what nature soever." *Acts of 1805 second session*, pages 30 and 32.

From these laws it results that the jurisdiction of the District Court was general and unlimited, extending to every case whatsoever. The law enabled the suitor to petition before it, for any relief to which he believed himself entitled.

## CASES IN THE SUPREME COURT

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Accordingly, the Superior Court, and after it the District Court, from their organization, exercised undisputed jurisdiction over successions, and in suits against the curators of minors, testamentary executors, and administrators of vacant successions. The cases on record which have not been appealed or reported, are extremely numerous. I will mention some of those which have been reported.

In the case of Magdelaine against the Mayor, 1 *Martin*, page 200, the plaintiff claimed the guardianship of her child, before the late Superior Court. Her demand was resisted, on the ground that the defendant had been appointed guardian by the civil commandant of Pointe Coupée, in 1804. The Superior Court declared in giving their opinion that "at that time it was very doubtful whether any other tribunal than the Superior Court, sitting at New-Orleans, was competent to appoint to the office which the Spanish laws, then in force, called a *dative tutor*."

In the same volume, 1 *Martin*, page 71, it appears that Mercier's administratrix maintained a suit against Sarpy's administratrix for debt, before the Superior Court. In volume 2, *Martin*, page 206, it is seen that Tonnelien sued Maurin's executor, before the Superior Court, on an account for wages, without the jurisdiction being questioned. The like jurisdiction was exercised by the District Court, in the case of Cloutier vs. Lecompte, 3 *Martin*, 481. The defendant, as *executor of Joseph Dupré*, was sued before the District Court, for a succession and judgment rendered against him in the Supreme Court.

In the case of A. L. Duncan against Cevallos's executors, 4 *Martin*, 571, suit was brought before the District Court to rescind the sale of a slave, and recover back the price.

In the case of Le Carpentier vs. Delery's executor, suit was maintained on a promissory note against an executor in the court of the parish and city of New-Orleans, whose jurisdiction was concurrent with that of the District Court. 4 *Martin*, page 454.

In the case of Dennis vs. Cordeviolla, suit was brought by the attorney of the absent heirs, against the *curator* of the

estate, in the Parish Court, to compel him to do his duty as curator. *4 Martin*, 654.

In the case of Jones *vs.* Gale's *curatrix*, the price of a slave was recovered in the District Court. *4 Martin*, 635.

In the case of Broutin et als. *vs.* Vasquat, a will was annulled in the District Court, and this court differing from the District Court, as to some points in the case, remanded it to the jurisdiction of the District Court for further proceedings. *5 Martin*, 169.

In the case of Gardiner and others *vs.* Harbour and others, suit was brought by heirs against heirs in the District Court, to regulate the effects of a will. *5 Martin*, 408.

In the case of Maurin *vs.* Martinez, suit was maintained against the administratrix of her husband's estate. *5 Martin*, 432.

So in the case of Franklin *vs.* Kimball's executor, suit was maintained on a promissory note. *5 Martin*, 666.

In the case of Cusson's wife *vs.* Fulton's executor, the suit was carried on in the District Court.

In the same court suit was maintained by Marshall and wife against Marshall and wife, on a will, for the share of one of the legatees.

In the case of Donaldson *vs.* Rust, curator of Alsop's estate, suit being brought in the court of the parish and city of New-Orleans, for the proceeds of a slave sold by the Court of Probates, all the arguments which have ever been offered in favor of the exclusive jurisdiction of the Probate Court, were pressed by the counsel of the defendant, on this court, who in their decision did not even notice them, but proceeded "to give such a judgment as in their opinion *ought to have been given in the Parish Court*," and condemned the curator to pay to the plaintiff the proceeds of the sale of the slave, made by the register of wills. *5 Martin*, 260.

So in the case of Labatut and others *vs.* Rogers, an ordinary and a special curator contending in the District Court for the proceeds of an estate, third persons intervened in the same court, and recovered it from both. *5 Martin*, 272.

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In the case of *Delacroix against Provost's executors*, the plaintiff recovered the amount of a promissory note, in the ordinary tribunals. *5 Martin*, 272.

So in *Davis vs. Preval, curator*, plaintiff had judgment in the Parish Court against an estate for the amount of his claim. *5 Martin*, 254.

And *Marie vs. Avart*, was a suit against an executor, in the Parish Court. *5 Martin*, 781.

These are some of the suits brought before the District and Parish Courts of the state, against curators, minor heirs, executors and other administrators, whose jurisdiction was recognised by the Supreme Court of the state. They might be greatly multiplied, and as to cases of the same character before the ordinary tribunals, which never came before the Supreme Court, they are innumerable, evincing the unanimous opinion of the judges of the state, of all lawyers, of all legislators, and indeed, of the whole people, that the District Courts had jurisdiction of all suits against estates, however administered.

From the organization of the courts in 1805, until August, 1822, when the case of *Vignaud vs. Tournacourt's curator*, was decided, *12 Martin*, 229, the jurisdiction had never been doubted but in a single instance, and probably the title to half the property in the state, rested upon its exercise of jurisdiction within those periods.

We are called upon to say, that the people mistook the meaning of the law enacted by themselves, giving jurisdiction to their District Court, in simple, plain and the most comprehensive language, that every one of the distinguished judges and lawyers of the state, for a period of near twenty years, misinterpreted its simplest, but most important law. To such a call we are obliged to say with this court, in the case of *Rogers vs. Beiller*, *3 Martin*, 670, 671: "Practice has fixed the proper construction. The judicial and legislative authorities of the late government have sanctioned it. *Optima legum interpres consuetudo*. If it was an erroneous one, it is the case to say *communis error facit jus*. It began

with the organization of the American government here. The question is to be considered now at rest, and ought not to be disturbed." And with the Supreme Court of the United States, in the case of *Stewart vs. Laird* in answer to a similar objection to jurisdiction: "To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years commencing with the organization of the judicial system, afford an irresistible answer, that indeed fixed the construction. It is a contemporary construction of the most favorable nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course the question is at rest, and ought not now to be disturbed." 1 *Cranch*, 309.

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The Superior Court, I have already observed, strongly indicated their opinion in the case of *Magdalaine vs. the Mayor*, that the Probate Court had no jurisdiction at all, in claims against estates, and the point having been brought directly before the Supreme Court in the case of *Abat vs. Songy's curator*, 7 *Martin*, 274, this honorable court, composed of two of its members and the late governor Derbigny, decided expressly that the Probate Court had no jurisdiction of claims against an estate, and that the jurisdiction belonged exclusively to the ordinary tribunals, reversing a judgment of the Court of Probates, in coming to that conclusion, although the parties had voluntarily submitted to that jurisdiction. No lawyer doubted the jurisdiction of the District Court at that period. Many, however, believed, that it was not exclusive; that the Court of Probates had concurrent jurisdiction. But now all were obliged, by a decision of the tribunal in the last resort, to regard the jurisdiction of the District Court as exclusive.

The decision of the Supreme Court, declaring the jurisdiction of the District Court, over claims against an estate, exclusive, and that the Court of Probates could take no such jurisdiction, even by consent, was rendered in the month of December, 1819.

The creditors of this insolvent estate, had now to decide whether to go into the Court of Probates to enforce their

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claims against it, the Supreme Court having just decided, in the case of *Abat vs. Songy's executor*, that the Court of Probates had no jurisdiction, and should not take it even by consent, or to go into the District Court, which had by statute, jurisdiction "in all cases," had exercised undisputed jurisdiction in such cases, from the beginning of the government, and whose jurisdiction the Supreme Court had now solemnly decided, was exclusive. They determined to go into the District Court to enforce their claims, and not into the Probate Court; and in so doing, it is contended they entirely mistook the law, and committed a capital error, which is to ruin them and their posterity, and all those who have purchased property on the faith of those judicial proceedings, the District Court having no jurisdiction, and the judicial proceedings of the creditors, to sell the property for the payment of their debts, being utterly null and void on that account. So to decide, would destroy all confidence in the tribunals of the country, and render them an insupportable curse, instead of our greatest blessing.

My own opinion has ever been, that the jurisdiction of the District and Probate Court, was concurrent at the time of Poultney's death, as to claims against successions, and that his creditors were authorised by law, to proceed in either court. The statute creating the District Court, clearly gave it jurisdiction, and the jurisdiction of the Probate Court may be fairly deduced from the provisions of the Civil Code of 1808, and statutes cited in the case of *Vignaud vs. Tournacourt's curator*. 12 *Martin*, 229.

This court, however, have held, in the numerous cases cited by the plaintiff's counsel, that the District Court had not jurisdiction of those cases; but that they belonged exclusively to the Court of Probates. But this pervading circumstance marks every one of those cases: in every one, without exception, a representative had been appointed in the Court of Probates, who, *ratione personæ*, could be sued in the court alone which appointed him. In every one, the defendant is an executor, curator, beneficiary heir, or representative of a minor, all duly qualified in the Court of

Probates. This constitutes the essential, total difference between those cases and the proceedings of Poultney's creditors against his succession, which was so situated, that no person would qualify as its representative, in the only manner in which the Court of Probates could appoint a representative, and which succession was therefore forced by its own circumstances, into the District Court. That court alone had power to qualify and give possession of the insolvent succession to a syndic, who was the only kind of administrator that would take charge of it. The case of Dupuy et als. *vs.* Griffin's executor, does not conflict at all with the distinction on which I insist. In that case, Debon, the *testamentary executor*, was a party defendant, and made opposition to the order granted for a meeting of the creditors, and succeeded in having it set aside, on the ground of the want of jurisdiction in the court (the District Court) to which they applied. 1 *Martin, N. S.*, 198. The estate was represented by an executor or beneficiary heirs, who were amenable to the Probate Court alone. Administration having been granted in a competent court to a competent administrator, it could not be taken by another court to be given to a syndic, who I have admitted, is to be appointed to an insolvent succession, only in default of all other administration.

The case of Jenkins *vs.* Tyler, does not differ in principle. The defendant in an order of seizure, having died, the court stayed proceedings until a representative should be appointed in his place. The case did not present any question as to how the representative should be appointed. That only was done which was done in Poultney's succession: proceedings were stayed until a representative was appointed, in both cases.

For the appointment of curators, on giving security, the qualification of executors and beneficiary heirs and administrators, the jurisdiction of the Probate Court had become exclusive, and that for ordering a forced surrender, a *concurso* and administration by a syndic, the jurisdiction of the District Court was at that time exclusive.

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The District Court then had jurisdiction of the claims of creditors against the fictitious being representing John Poultney in every respect, because his heirs had neither accepted nor renounced his succession, and was bound to proceed and appoint syndics to administer his estate, *in default of every other administration*.

Still, the heirs of John Poultney had a right at any time to accept the succession, and "that acceptance would have a retroactive effect, so that they would be considered as having taken possession of the estate when the succession was opened by the death of their ancestor." *Old Code, page 160, article 72.* "Save, however, the rights which may have been acquired by third persons, upon the property of the succession, either by prescription or by lawful acts done with the administrator or curator of the *vacant estate*." *Old Code, page 964, article 95.*

"An inheritance refused, must be taken, such as it is, at the time of claiming the same, and the claimant shall have no right to contest any *sales* or other *acts* which may have been *legally* made, during the *vacancy* of the inheritance." *Old Code, page 70, article 64.*

Under the laws in force at the time of Poultney's death, there was no difference in the principles applicable to an inheritance refused, and that which was not accepted. Under the old Code, the heir was seized of the succession, only by acceptance. *Page 70, articles 62, 63, 74; page 162, article 74; page 168.*

The heir could acquire the succession only by petition to the judge. *2 Moreau and Carlton's Partidas, page 1020, law 13.*

We must not be led into error in this case by the French law and new Code, which changed the whole system of our jurisprudence. See *articles 934, 935, 936, 937, 938, 1007, Project of the new Code, page 114.*

The succession of Poultney presented a mere question of *administration*. The heirs had not *acquired it*, were never seized of it, and did not apply for the administration with benefit of inventory, until 1833. Other administrators were

duly appointed for the administration. Did they do lawful acts of administration, by which the succession was divested of the property now in controversy? This is the only question in the cause.

The great point made is this, that the proceedings before the District Court, for a meeting of Poultney's creditors to appoint syndics, are null and void, as against the heirs of Poultney, because they were not cited, nor in any manner made parties thereto.

They could only have been cited to declare whether or not they would administer, by accepting the succession with benefit of inventory. Had their tutrix been cited, and judgment by default taken against her, it would have had no effect, because she could only have refused by authority of the judge, by and with the advice of a family meeting; and she could not have been compelled to accept at all. The citation, therefore, would have been a perfect nullity in law, and *lex neminem cogit ad vanam*.

Our laws made it Mrs. Poultney's duty to act on behalf of her minor children, and they cannot now take advantage of her neglect to act in the administration of the estate, even supposing it a neglect.

The estate was bankrupt. A forced surrender was ordered, in which the bankrupt is never cited. *7 Febrero, page 18, No. 39.*

The proceedings were *via executiva*, not *ordinarias*, which citation might even vitiate.

It would be absurd to require citation where the proceedings are against the whole estate, and the possession of the whole is taken. The sequestration supersedes citation.

Mrs. Poultney had opened the succession of her husband, in the Probate Court. The syndics filed their petition there for possession of the property. She did know, she was obliged to take notice of all claims in a case she herself had commenced.

She caused the seals to be affixed. She knew they were raised on the application of the syndics, and for what purpose they were raised.

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She caused an inventory to be made, and yet permitted the syndics to take the property. As tutrix of her minor children, she joined with the syndic in executing the judgment, putting him in possession, and aiding him to administer the property. See the two powers of attorney filed, dated 1st of July, 1821, and 18th of February, 1823, given by her with the syndics.

Had Mrs. Poultney, as tutrix, appeared in court to oppose the proceedings of the creditors, this would have been a waiver of citation. *Brandt and others vs. Dyson, 9 Martin, page 497.*

Appearing before a notary public, jointly with the syndic, to aid in his administration, is not only a waiver of citation, but an approval of the judgment appointing him, and of the proceedings by which he is appointed. It is also a voluntary submission to, and execution of the judgment and proceedings.

Citation is necessary to the heir in an ordinary suit, and this is the case to which the authorities from *Febrero, chapter 7, Curia Philippica*, and all the other authorities cited, are applicable.

Citation is also necessary to known heirs, before appointing a curator to an estate which belongs to them, if it can be accepted purely and without benefit of inventory. But a minor could not be compelled to accept or renounce, and could accept only with benefit of inventory; therefore, as to his rights to the property, citation could produce no effect. His renunciation or failure to accept, could not affect his property. *6 Partidas, title 6, law 20.* If sold without necessity, the minors, notwithstanding the citation and failure to accept the administration, are entitled to it at any time, on accepting it in the form required by law. Until they apply, if the succession is dilapidated by mal-administration, the law provides them ample relief by the action of restitution. Applying these principles to the case before the court, John Poultney, by asking for a respite, was a bankrupt. *Old Code, 438. Curia Philippica, 406, Nos. 1 and 2. Recopilacion, book 2, title 32, 62. Ward vs. Brandt and others, 9 Martin, 636.* His heirs did not comply with the terms of the respite, and therefore, the succession, which represented him in every respect, was an insolvent succession.

By demanding a respite of the District Court, and becoming bankrupt in that court, Poultney himself had placed his insolvent estate under the jurisdiction of that court. The respite was effectual, only by being homologated by the court. *Old Code, page 438, article 5.* The judgment of homologation prohibited the creditors from proceeding against him or his property, and bound him to pay them in equal instalments, at one, two and three years.

This judgment, the court alone which rendered it, had the power to execute. It constituted Poultney, merely administrator of his property, under the superintendence of the court, for his creditors. He was bound to sell and pay. He could not mortgage his property or change the situation of his creditors. *Old Code 438, article 1, 468 article 67. Brandt's syndics vs. Shaumburgh, 2 Martin, N. S., 329.* If he did not pay at the terms, they could assemble and obtain relief. *Salgado, part 1, chapter 1, No. 44.* They could compel him by imprisonment to pay, depriving him of the benefit of the cession of property. *Villadego, 53, No. 167.*

The heirs could take the estate only where they found it, in the situation in which their father had placed it. The District Court had under its jurisdiction the whole of it, subject to a judgment of that court.

It might be fairly doubted, if the heirs could take the estate from the jurisdiction of that court to which their father had subjected it, and in which jurisdiction the creditors had become interested, by judgment subjecting the whole estate to administration, for the payment of their debts.

At all events, the retroactive effect of their acceptance, makes them party to the proceedings and judgment in the District Court, because their father was a party; and, being a party by this retroactive effect, citation to them was unnecessary; the creditors having merely proceeded to administer the property which their father had put for administration in the District Court, and to which administration, by his death and the retroactive effect of their acceptance of his succession, they became parties by operation of law.

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When Poultney died, his minor heirs were entitled, by accepting with benefit of inventory, to the residuum, after administration. *Old Code*, page 168, article 104. Acceptance with benefit of inventory, would also have entitled them to the administration of the succession, which is an entirely different thing from the property. *Old Code*, page 168, article 104; also, page 166, article 102.

They were by law specially allowed three months and forty days, to claim the administration, by accepting with benefit of inventory. *Old Code*, 166, article 100 and 103. Their tutrix, during that period, was bound to act, if she intended to administer. *Old Code*, page 68, article 52 and 54. After this period, it was certainly the duty of the judge to appoint an administrator. *Old Code*, page 84, articles 33 and 34.

In making that appointment, it is not necessary to cite the beneficiary heirs: *First*, because it was the duty of their tutrix to act if the administration was beneficial to them. *Second*, because they could have no interest in the administration, not even commissions being allowed; but only in the residuum after administration. *Third*, because they could take the administration at any moment out of the hands of the administrator, by accepting the succession, which would have a retroactive effect, saving only the lawful acts of the administrator while the estate remained vacant. *Old Code*, page 164, article 95.

It is by confounding the rights of the beneficiary heir to the administration with his right of property, that we are led into error as to citation.

To deprive him of his property, his residuum, citation is necessary. To apply for the administration because he does not apply for it, and in this case was absolutely unable to take it, was an entirely different thing. The creditors applied for the administration only in default of all other applications.

And in cases of administration, no court in the state ever gave any other notice of the application, to others who might have a better right to administer, than by public advertisement.

No personal notice is ever given to the heir, of application for EASTERN DIST.  
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I pray the court, then, not to confound a mere application for administration, duly advertised, and made in default of all other applications, with a suit for the right of property, or for debt, in which citation is necessary.

The creditors applied for administration to the court, which, by the act of Poultny, had taken jurisdiction of his bankruptcy, and which had a right to order the *concurso* of creditors, for failure to comply with the respite. They applied to the District Court, whose jurisdiction was unlimited. They did not apply to the Probate Court, which had no power to order a *concurso* until the passage of the act of 1826.

In making the application to the District Court for a meeting of creditors, it was unnecessary to cite the heirs of Poultny, or even to appoint a defensor to the estate. The estate, by the order forbidding proceedings until the meeting of creditors, was to remain in *status quo* until a syndic was appointed and confirmed by the court. When thus appointed, the syndic represented the estate contradictorily with all individual creditors, and represented the heirs of Poultny, as to any residuum that might be saved for them, just as the administrator represents the estate and heirs in all other administrations.

At present the judge is authorised himself to administer a *succession so much in debt*, that no one will take the curatorship. *Civil Code, article 1178.* He is not obliged to cite heirs, to compel family meetings, to see if minors will not administer; but is to administer *ex-officio*, if no one applies for the administration.

What he may now do himself by express law, might well have been done under the ancient laws, by the intervention of a syndic, appointed by the creditors, and approved by the court.

The fallacy consists in applying dogmas about citation, to cases to which they have no application. They apply to suits for the rights of property or for debts, not to applications for administration.

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The minor cannot loose his rights, that is, *what belongs to him* by administration. If his property is sold without necessity or authority, he can recover it back. Even if there be mal-administration, he has his redress; and being able to accept at any time and take the administration, and acceptance operating retroactively, he can claim every thing but what has been alienated from necessity, and by a legal administration. This is equity in its utmost latitude.

That minors, having inherited *bankruptcy*, should recover *millions* as the representative of their bankrupt ancestor, from that severe industry and rigid economy which had purchased it on the faith of judicial proceedings, when sold by law to pay the crying creditors of the bankrupt a small dividend of their claims, and thereby ruin hundreds of minors, bring distress on whole families, and indeed a community, and destroy all confidence in the laws and tribunals of the country, would be intolerable; for it would be a case where the sacrifice of substance to imaginary forms would be too glaring to be borne. No, this court will say *fiat justitia*, even if we think that our predecessors, acting in the utmost good faith, exercising their best judgment, have erred in mere form.

The *Curia Philippica* informs us that citation is not necessary, when it appears notoriously, that no defence belongs to the person, having no right in his favor. *Page 66, No. 22:* "Y del mismo modo no es necesario, cuando consta notoriamente, que no le compete defensa alguna á la persona, por carecer de derecho para ella."

And what defence could be made by the heir against a judgment confessed by his ancestor, and bearing mortgage with the privilege of vendor, on the property sold for the payment of the price.

*In negotiis minorum non tam quomodo et quibus solemnitatibus, sed quid in substantia factum sit inquiritur.* *Paz's Praxis, decisiones 13, page 36.* *Auctoritas judicis supplet defectum citationis.* *Ibid.*

In the case of *Keene vs. M'Donogh*, 8 Peters's Rep., 308, judgment and sale were maintained in the Supreme Court of the United States, although no citation was issued.

In the case of the lessee of Livingston *vs.* Moore and others, sales of immense property in which minors had the legal title, were held good without citation or notice, on account of the insolvency of the ancestor. *7 Peters's Reports*, 468. See the authorities quoted in that case, at page 506 and at 522; and the legal and equitable observations of the counsel, Mr. Sergeant, at page 522, 523. The Supreme Court, in giving their opinion, which is every where full of excellent observations, finally admit, as contended for by plaintiffs, a contract on behalf of the state of Pennsylvania, to enforce its liens on their ancestor's property, only "*by judicial process*;" "but," say the court, "it may be answered, if there was, in fact, such a contract imputable to the state, the performance had become impossible by the act of God, and of the party himself, by his death, *and by that confusion of his affairs which prevented every one from assuming the character of his personal representative*," *Ibid.*, pages 549, 550; and decided, in substance, that the titles to the property of the bankrupt, sold to pay his debts, after his death, though his minor heirs were *absent, unrepresented and not notified*, should not be disturbed; the minors there, as here, claiming it in consequence of an incalculable rise in the value, not through them, but by the vigor and enterprise of the purchasers.

As the estate of John Poultney presented a mere question of administration, whether by the beneficiary heirs, by a curator or by syndics, and has been administered by the latter, under the authority of a competent court, I contend that his heirs have no other action but that of restitution for mal-administration. In this action they can recover only the loss which they have suffered by the negligence of their tutrix, or the fault of the syndics. *2 Moreau and Carleton's Partidas*, page 1153, law 2; 1156, law 7; and must prove their damages. *Ibid.*

We do not pretend, as supposed by the plaintiffs in their 22d point, that minors can be prejudiced by the *neglect or omissions* of their tutrix; we only contend that they cannot gain millions by the *neglect and omissions* of their

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tutrix, and gain it from the labor of persons who have committed *no fault*, unless it be a fault to confide in the proceedings and judgments of the highest tribunals of their country.

Had their tutrix not been negligent, had she administered the insolvent inheritance of these minors, her first and most sacred duty would have been, to do that which has been done, to sell the property in controversy, to pay the price their ancestor contracted to give for it, and to save his friends, who had endorsed for that price, from ruin. No sale that she could have made, would have produced eighty thousand dollars, of which near a half was due in cash, with interest, and could she have sold it for more, the surplus would have gone to other creditors. That she could not have realized any thing for her children, is proved by her own renunciation, believing she could realize nothing for herself. Could she in fact have sold the land for more than enough to pay the creditors, when they who were so much more interested in obtaining a high price, failed to obtain enough to pay themselves? It cannot be believed without doing violence to our reason.

Even if the plaintiffs may maintain an action of revendication, their claim is in direct conflict with the long settled jurisprudence of the country. The property in controversy has been sold under the decree of a court of general jurisdiction, to pay the debt of their ancestor, secured by privilege, and mortgage upon it. The court had jurisdiction *ratione materiae*, and was not deprived *ratione personæ*; no administration having been granted in the Court of Probates. How much stronger, then, are the titles of the defendants, than in the case of Foucher *vs.* Carraby, 6 *Martin, N. S.*, 550, in which this court held, that a sale made by authority of the District Court, gave a good title, although the court, *ratione personæ*, was without jurisdiction of the case. How much stronger than the case of Tabor *vs.* Johnson, 3 *Martin, N. S.*, 674. See also on this point, 1 *Louisiana Reports*, 20. 3 *Ibid.*, 519. 3 *Martin, N. S.*, 605.

It is the settled jurisprudence of the country, that a sale made by virtue of a judgment, which is afterwards reversed, is valid, even if it should be reversed on a plea to the jurisdiction, as in the case of *Baillo vs. Wilson, 3 Martin, N. S., 72, 74.* There can be no doubt that a sale made by virtue of the judgment, while unreversed, would be valid; and if so, how much more strongly may the defendants confide in a sale made in pursuance of judicial decrees and proceedings, unreversed and not annulled to the present day. We must have confidence in the judgments and proceedings of our judicial tribunals, or all confidence in society will be lost.

The principle for which I contend, prevails with regard to a will, which, when proved and registered, gives validity to all transactions founded upon it; although, when contested, it is declared null; and although the law declares it, for any defect of form, utterly null and void: and the acts of a curator are valid, although his appointment may be afterwards annulled. The case under consideration is far from being so strong: the beneficiary heirs have merely *succeeded* to a *previous* administration by syndics, but have never annulled that administration by suit.

We hold it to be clearly and unquestionably the law, that the heirs of Poultney cannot treat all these judicial proceedings, by which the property of his succession has been alienated, as nullities, and maintain an action of revendication. Perhaps they might have done so before the adoption of the Code of Practice in 1825. But that code provides, that a party to a suit, even if *not cited*, and if the court *had no jurisdiction*, cannot set aside the judgment, except by action of nullity. *Code of Practice, articles 604, 605, 608, 610, 611, 612, 613.* All other rules of practice have been expressly repealed, and all civil laws supporting a different practice, by the act of 25th March, 1828, *page 160.*

All judgments of record in 1828, and all judicial proceedings which are the muniments of title, must, therefore, remain in full force and virtue, until annulled in the modes pointed out by existing laws of the country. Our argument

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on this point is far less liable to even apparent objection, than the decision of the Supreme Court of the United States, in the case of Jane Watson and others *vs.* John Mercer and others, 8 *Peters*, page 88. In that case, property had been lost by judgment, on the ground that the conveyance was informal. It was recovered back by judgment; the legislature of Pennsylvania having passed a law declaring the conveyance valid, notwithstanding the informalities.

It is urged that we claim by title from Harrod & Ogden, under proceedings in the Probate Court, and therefore cannot show that plaintiffs' title has been divested. We claim nothing but to be let alone, to sit under our vine and fig tree with none to make us afraid, and by the express provision of the 44th article of the Code of Practice we are entitled "to be discharged from the plaintiff's demand unless the plaintiff make out his title." The plaintiffs show title in their father. We do not dispute that title, but show that it has been divested out of his succession; then they have no title. If the heirs can still recover from us, they do it without title, which the article expressly prohibits. It has been established as a maxim of our law, that "the plaintiff must recover by the strength of his own title, not from the weakness of his adversary's." *Sassman and wife vs. Aimé*, 9 *Martin*, 262. 3 *Partidas*, tit. 14, law 1. In *White vs. Holstein*, 4 *Martin*, 474, this honorable court have said "the persons claiming the estate are bound to make good their title against the legal possessor; and, in opposition, the latter has a right to set up and prove, by legal means, any title which may defeat the claim of the plaintiffs."

Even the *knavish* possessor cannot be evicted until the right of the person making claim as owner, is established. *Civil Code*, article 3417.

Now, by the foregoing judicial proceedings, we have shown that the title, by virtue of which the plaintiffs sue as heirs of John Poultnay, has been divested out of his succession. They could not, therefore, maintain this suit against us if we were but *knavish* possessors.

But I will now proceed to show, that we hold by a title supported by the very letter of the law, even supposing, as contended by plaintiffs, that the estate of Poultney vested in them by his death, and that all the proceedings in the District Court were absolute nullities.

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In consequence of the decision of this court, in the case of Vignaud *vs.* Tournacourt's curator, doubts originated lest the title of the plaintiffs had not been legally divested, and proceedings were commenced against them in the Probate Court of the parish of Orleans.

Charles Harrod, surviving partner of the firm of Harrod & Ogden, Georgiana F. B. Ogden, only heir of George M. Ogden, and Henry D. Ogden, only heir of Peter V. Ogden, the minors, represented by their mothers, presented their petition to the Probate Court, on the 18th of January, 1824. They set out the sale by Mrs. Rousseau to John Poultney, of her plantation, on the 27th of May, 1818, for one hundred thousand dollars, and that they are holders of three of the notes given in payment, amounting to forty-eight thousand dollars, which they had taken up as endorsers for Poultney. They set out the mortgage reserved on this plantation to secure those notes ; that the endorsers, by the act of mortgage, were subrogated to the rights of the vendors, in case they should be compelled to take up the notes.

That Poultney died the 23d of October, 1819, leaving two children, Matilda and Emily, under twelve years of age ; that his widow renounced the community of acquests, on the 25th of January, 1820 ; that she was natural tutrix of her children ; that payment had been demanded of her and refused.

They therefore prayed, that she might be cited as tutrix of her children, to answer the petition, and decreed in her capacity to pay to them the said sum of forty-eight thousand dollars with interest and costs ; and in the mean time, that the mortgaged property might be seized and sold, according to law. The petition was signed by Samuel Livermore, as counsel. The affidavit of Francis B. Ogden was annexed, attesting the material allegations set forth in the petition,

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averring that the heirs of John Poultney, named in the petition, were justly indebted to the petitioners, in the sum of forty-eight thousand dollars, exclusive of interest, and that no part thereof had been paid.

The following order was made on the petition:

"Let the defendant be cited to answer the within petition, and let the mortgaged premises be seized and sold by the sheriff, according to law."

*"New-Orleans, January 17th, 1824."*

(Signed) JAMES PITOT, Judge."

Citation was issued to Mrs. Poultney, accordingly, and the sheriff made return in these words:

"Served copy of petition and citation, and also, of the within order on the widow Poultney, by leaving the same with John R. Grymes, Esq., her attorney."

*"January 26th, 1824."*

"Returned same day. G. W. MORGAN, Sheriff."

An order of seizure and sale issued, in pursuance of the order of the court, against the plantation. It is dated the 22d of January, 1824, and signed by Martin Blache, the register of wills.

The sheriff returned said writ, that he seized the plantation, describing it particularly, and after stating the sale of a certain part divided into lots, declares, that "on the 23d of February, 1824, having exposed the remainder of the plantation to public sale, according to law, on the same day, Charles Harrod and F. B. Ogden became the purchasers thereof, for the price of twenty-seven thousand dollars," and that he left the proceeds in the hands of the plaintiffs, they having obtained judgment for forty-eight thousand dollars, in this court, on the 6th of March, 1824. The return is dated the 24th of April, 1824, and signed by George W. Morgan, sheriff.

These proceedings conform exactly to the literal provisions of our former laws.

The old Code, page 460, article 40, prescribed them precisely, especially when we consider that the succession,

until accepted or renounced, represented in every respect, the deceased, to whom it belonged. That article authorised the creditor, having "a title amounting to a confession of judgment, on his oath that the debt was due, to obtain from the judge *an order for an immediate seizure of the thing mortgaged.*" The act of 1817, page 34, section 14, enacted, "that in no case, except in cases of judgment by default, it shall hereafter be necessary for the sheriff to give notice to pay the money due on an execution, before proceeding to levy on the same; and that no sale of immoveable property, seized by the sheriff, shall be made in less than thirty days from the first advertising. And if, on the day so appointed for the sale, the money due by said execution, and legal charges be not paid, the sheriff shall proceed to sell the property seized, to the *highest bidder*, for ready money, or for such term or credit as the plaintiff may, in writing under his hand, direct.

But it is objected to these most formal proceedings, conducted by an eminent counsellor, for the very purpose of making a good title to the property in controversy, that the order of seizure was illegally issued against the plantation mortgaged by John Poultney, without having the title declared executory against his heirs.

The title was equal to a judgment. It was a judgment confessed, and to be executed against a particular property, which was mortgaged, and which property represented John Poultney, in every respect.

The articles of the *old Code*, *page 200, article 229* and *page 498, article 7*, relied upon in support of the plaintiffs' objection, apply in express terms to the case where the creditor wishes to execute a judgment rendered against the deceased, not against the *property of the succession*, but against the *person or estate* of the heir. To render the heir personally liable, or his property, independent of that derived from his ancestor, the law required personal proceedings against him. In order to render him or the estate which he held, independently of his ancestor, liable for a debt of the ancestor, it was necessary to show that he had accepted the succession, and that he had

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**EASTERN DIST.** accepted it purely, *old Code*, page 162, art. 72; page 164, art. 86; and not with the benefit of inventory, page 166, art. 97.

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The law, as applied to the present case, meant simply that the widow and minor heirs of Poultney could not be imprisoned by a *capias ad satisfaciendum*, although their insolvent ancestor might, nor could be turned out of the house they held independent of him, by execution, because if the creditor wished to execute his judgment against them and their property, he was obliged first to cite them, to which citation the widow could successfully answer, that she had renounced the community of acquests; and the minors, that they had accepted only with the benefit of inventory, rendering the property of their ancestor alone liable for the debt.

The first article relied upon has been changed, the last omitted in the *new Code*, and the mode of proceeding expressly provided for by the *Code of Practice*. The change, omission, and the mode of proceeding prescribed, all prove the correctness of the construction of these articles, for which we contend. The article 229, page 200, of the old *Code*, has been thus changed:

"Titles which carry execution against the deceased, are also executory against the heir personally; nevertheless, the creditors cannot obtain execution on them, until ten days after the notification of them be made to the person, or left at the domicil of the heir." *New Code, article 1395.*

"The heir on being notified thereof, may oppose the execution, before the tribunal having cognizance of the matter, on his simple motion; and if he proves that he has claimed the delays for deliberating, the execution shall be suspended until the delays have expired." *New Code, article 1396.*

The object of these provisions is evident, to enable the creditor to render the heir personally liable.

The object of the citation is evident, to enable the heir to show that he is not personally liable. If the creditor shows that the heir has accepted the succession, "he may act against that heir, in the same manner as he would have

done against the debtor himself." The whole object of these provisions, and those of the old Code, is to render the heir personally, and his property individually, not that which he holds as heir, liable for his ancestor's debt. The *articles* 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407 of the *new Code*, and *article 230, page 202* of the *old Code*, all show conclusively, that the meaning for which I contend, is not only the literal meaning of *article 239, page 200*, and *article 7, page 490*, of the *old Code*, but that it is the meaning indicated by the whole spirit of our law on the subject. And the observation in the case of *Legendre vs. M'Donough*, 6 *Martin, N. S.*, 514, to establish a contrary meaning, so far from being a decision of the court, is not even an *obitur dictum*, but a mere casual remark, by way of illustrating an argument.

Citation, in this order of seizure, to the heirs of Poultnay, was not necessary; indeed, had the citation been served, it might have converted the proceeding from the *via executiva*, to the *via ordinaria*, had the heirs appeared and required it. *3 Martin, N. S.*, 500. *8 Ibid.*, 96.

The sheriff returns, that he seized the property on the 22d of January, and on the 23d of February, 1824, sold it, *according to law*, and left the proceeds, deducting charges, in the plaintiffs' hands, to whom it was due by judgment rendered in the Probate Court, the 6th of March, 1824. The sheriff's return and deed proves every thing legally done, unless the contrary be proved. *Lafon vs. Smith*, *3 Louisiana Reports*, *page 476*. Therefore, the property was duly advertised and appraised, and the proceedings, as prayed in the petition, carried on contradictorily with Mrs. Poultnay, the mother and tutrix of the minors Poultnay, who was obliged, as far as they had any interest, to represent it in a judicial proceeding. *Old Code*, *page 74, article 81, No. 4. Ibid., page 54, article 55*.

Under these proceedings, which are in the most perfect form, Charles Harrod and Francis B. Ogden, as the sheriff's return and deed prove, acquired all the rights, title and

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The act of 1817, relied on by plaintiffs, in terms regulates proceedings in the Probate Court, but takes no jurisdiction from the District Court. The provision contained in the act directing the immoveable property of vacant successions not to be sold until a year after it is opened, and the various other laws prohibiting the alienation of minors' property, do not conflict with the proceedings in Poultney's succession; for, by an act of 1809, which is unrepealed and still in force, it is declared, that the provisions of law "which go to prohibit the sale of the estate of minors, in certain cases, or to authorise the sale only if it should amount to the estimated value of said estate, shall not be construed to affect such sales as shall be forced upon minors, when the estate of said minors is seized by virtue of a decree of a court of justice, or otherwise." 3 *Martin's Digest*, 130. - And by an act passed in 1811, it is said again, "that nothing in the act shall prevent any sale of minors' property, should said sale be necessary for the payment of the debts of the estate." 3 *Martin's Digest*, 134.

Prescription also bars the claim of the plaintiffs in this suit.

The creditors of John Poultney, by their syndics, were put into possession of the property of his succession, by an order of the District Court, on the 4th of April, 1820. They had petitioned, and in effect obtained the order of the Court of Probates, for the same purpose, on the 23d of March, 1820. They and their vendees have held the property, believing their title good, ever since. The suit of the heirs of Poultney, against William Cecil, was commenced on the 3d of December, 1832, more than ten years after the creditors of Poultney were put into possession of his estate; also, more than ten years after the property now in dispute, had been sold by the sheriff, to George M. Ogden, which sale took place on the 13th day of June, 1820.

Now, the estate of Poultney was either vacant, no person having claimed its possession as heir, or under any other title,

*old Code, page 175, article 118*; or, if it belonged to the heirs of John Poultney, it belonged to them as heirs who had not yet accepted it. *Old Code, page 70, article 62.*

In either case, prescription runs in favor of the possessors of the property, *old Civil Code, page 486, article 62*, latter clause, *new Code, 3492*, "prescription runs against a vacant estate, though no curator has been appointed to such estate."

So, also, prescription runs against an estate, the heirs of which have not yet accepted it. The heirs of Poultney might, and did accept their father's succession, in March, 1833, more than ten years after his creditors had been put in possession of the property in controversy, and had caused it to be sold by a competent court. Now, our old and new Codes prescribed "that the heirs might, at any time, accept the inheritance, without prejudice however to rights which may have been acquired by third persons, upon the property of the succession *by prescription*," *new Code, article 1024*. *Old Code, page 164, article 95*; *page 70, article 64*. These laws are reconcilable with those which provide that prescription shall not run against minors. As to property acquired by minors, prescription does not run; but as to their right to that which has been abandoned by their representatives, which has never been acquired by them, prescription does run in favor of third persons.

Those, therefore, who held in good faith under the judicial proceedings in 1820, acquired before the institution of this suit, a title by prescription against the heirs of John Poultney.

The argument, that the introduction into our new Code, of the principle of the French law, "*que le mort saisis le vivant*," interrupts the prescription, is utterly untenable. "A law can prescribe only for the future, it can have no retrospective operation," *new Code, article 8*. The principle can only apply to an inheritance which devolves by a death, subsequent to the passage of the new Code. The defendants bought their property on the faith of the existing law of prescription; it made part of their contract in buying, as much as if embodied in the bill of sale; and in this unhappy community, we may

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consider the law of prescription the most important part of a contract for the purchase of real property.

Besides, I have to observe, that the old principle, so far as minors are concerned, is retained in the new Code, *verbatim*. He can accept an inheritance only with the benefit of inventory, by authority of the judge, on the advice of a family meeting. *Louisiana Code*, 345, 346. The practice conforms to these articles, for the plaintiffs in 1833, complied with all the formalities they prescribe, in order to maintain this suit.

In the course of the foregoing argument, I think we have successfully combatted or destroyed the effect of the 1st, 3d, 4th, 5th, 6th, 9th, 17th, 18th, 20th, 22d, and 23d points made by the plaintiffs; and on due consideration of our argument, the court will see that the 7th, 8th, 12th, 14th, 15th, 16th, and 18th points made by the plaintiffs, are immaterial, or have no bearing on the merits of this case.

The principle advanced in the third point we admit, and have shown, that the property in controversy has been divested out of the succession of John Poultnay, by lawful acts.

As to the 10th point, we contend the property was advertised and sold according to law. The order directing the sale, was made on a petition drawn with the utmost care by Mr. Livingston, the greatest lawyer that ever practised at this bar, and unsurpassed at any bar. It is dated the 9th May, 1820, and was notified the 10th.

The sale took place the 13th June, 1820, allowing full time to advertise and comply with all the formalities of law, and the sheriff's return is full evidence, until disproved that those forms were observed. *Lafon vs. Smith*, 3 *Louisiana Reports*, 473. Consent, judgment and sale on credit for the benefit of all concerned, may legally dispense with appraisement.

And on the 11th point I have to observe, that as the syndics had a right to sell, through the intervention of a public officer, the court had a right to order the sale by

the sheriff, on an application against the syndics. So far from resisting the order, they spread their consent on the record.

In the 13th point, the principle of the laws of Spain are mistaken ; it was only the pledge in his own hands, that the creditor could not purchase. *Moreau and Carleton's Partidas*, 839, law 44. Besides, the *remate* of the Spanish law had been superseded in our statutes, by special executions.

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In introducing the common law executions into our system, we introduced them with all their principles. *The creditor* could buy on a common law execution, and our statute directed the sheriff to sell to the "last and highest bidder." The statute makes no exception. All may bid who are capable of contracting. There is no reason for the exclusion of the creditor ; his bid is advantageous to the debtor, and his right to bid has been admitted in practice ever since the change of government. The article 688 of the Code of Practice, did not introduce a new, but like almost all the articles of the Code, reduced to writing the old and legal practice.

The fallacy of this suit consists in supposing that we understand laws by which our predecessors were governed, better than they understood them themselves, although they have been changed, and we are governed by an entirely different system ; but on a minute examination, we have found that our predecessors, now no more, pursued *the very letter*, and perfectly understood the spirit of the existing laws. Had, however, scrutiny pointed out errors in their proceedings, we might have said with confidence, they acted in good faith, to the best of their judgment ; they did that which was substantially right. They sold the property of a bankrupt for its full value, to pay his debts. Hundreds have vested the toil of their lives and the hopes of their children, on the faith of these judicial proceedings of their courts, where, if confidence cannot be reposed, we are cast upon the ocean of uncertainty, without a helm to guide us to port. We might have appealed to justice and equity, which would have cried to heaven in our behalf, and have said with

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If, instead of the fictitious being representing John Poultney, which we have so often presented to the court, he could rise from the dead, himself, I cannot but think his spirit would rebuke this suit. He would proclaim that he left nothing but bankruptcy in this world, and no wish behind him, but that his insolvent succession might be sold to indemnify his suffering, generous, confiding endorsers, and that his widow and children might not mingle in his misfortunes. And, on the plea of prescription, perhaps his departing shade would warn us, in the language of a great jurist: "As men are mortal, let not litigation be immortal.

*Strawbridge, for Harrod, called in warranty, argued generally for the defendants, from the following points :*

1. Amongst the points filed by the plaintiffs, the 6th, 7th, 8th, 9th, 12th, 18th, 21st and 22d refer to nullities or errors, which do not *ipso facto* render a judgment void, cannot be inquired into collaterally between the same parties ; but can only be corrected by way of appeal. 11 *Martin*, 607. 4 *Ibid.*, 414. 8 *Ibid.*, 178. *Louisiana Reports*, 21. 3 *Ibid.*, 520. 7 *Ibid.*, 36.
2. Purchaser at sheriff's sale, not affected by any irregularity in judgment or in former proceedings. 11 *Martin*, 607. 4 *Martin, N. S.*, 456. Even when judgment was reversed, sale held good. 5 *Martin, N. S.*, 213. See also, 7 *Martin*, 226, 246.
3. As to the irregularities after judgment, as referred to in plaintiffs' 11th and 20th points, it is merely an error in dates ; the order in the first case, was made 8th May, 1820 : the execution issued next day. On the 31st May an amendatory order was made by consent, dispensing with appraisement, and fixing a credit ; the sale took place June 13, thirty-five days after. In the second case, the order of seizure issued 18th January, being thirty-six days previous to sale.

**4. Jurisdiction.** By laws of 1804, page 80, Superior Court had jurisdiction in all civil causes; which powers were afterwards transferred to the District Court. *2 Martin's Digest*, 188, 192.

The Parish Court, though its jurisdiction has been frequently altered and extended, never possessed any exclusive jurisdiction until the Code of Practice.

In Donaldson *vs.* Rust, 6 *Martin*, 260, when the right of jurisdiction was contended to be in the Probate Court, the argument was not noticed.

In Abat *vs.* Songy it was held that the Court of Probates had no jurisdiction of claims against a succession. 7 *Martin*, 274.

In Casanovichi *vs.* Debon, it was questioned whether it could compel an executor to account. 10 *Martin*, 12.

Yet in Vignaud *vs.* Tournacourt, 12 *Martin*, 229, on which plaintiffs rely, it was said Courts of Probates had exclusive jurisdiction.

Since then, in Tabor *vs.* Johnston, 3 *Martin, N. S.*, —. Skillman *vs.* Lacy, 5 *Ibid.*, 50; Foucher *vs.* Carraby, 6 *Ibid.*, 548; Donaldson *vs.* Dorsey, 7 *Ibid.*, 376, the current has been setting back, and by these and many others, it is clear that the District Court is not without some jurisdiction in these matters.

The project for the *new Code*, where article 1159 is introduced, shows by the note what the rédactors thought of these things.

**5. Citation** is necessary to begin a suit. Here the suit was commenced in Poultnay's lifetime, he swore to his schedule, his creditors to their respective debts, the court homologated the proceedings. Is this not a judgment? And for what are his heirs to be cited? It is said to have the judgment declared executory; but this is not an error which renders the judgment null.

Citation is not necessary in granting administration; the law did not require it then, and does not now. A curator must advertise ten days; an executor is confirmed, or an administrator made without calling in any one. And this is

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not a forced surrender as called, but merely the appointment of an administrator.

With regard to the 19th point of plaintiffs, respecting Mr. Grymes's authority, it does not follow that because a party may appear in this suit where an attorney is acting, and deny his authority, that they can do it in a suit circumstanced as this was. It would be to make plaintiff a witness in his own cause.

Beyond this, enough appears on the record, to show Mr. Grymes was the attorney: he acted as Poultnay's attorney in his lifetime; he acted for his syndics; but, above all, he acted as the counsel of Mrs. Poultnay, in taking the inventory which he has, in her presence, signed in three several places: he acted as her counsellor in the renunciation of the community; and he is now acting as her attorney in this suit. Her affidavit, if admitted, cannot controvert these things.

6. In addition to the grounds assumed in our first point, since the Code of Practice, by article 556, the only modes by which judgments can be reversed, are: 1. New Trial; 2. Appeal; 3. Action of Nullity; 4. Action of Rescission.

By article 606, want of jurisdiction in a court; want of citation, &c., are made causes of nullity to be sued for in this action, and by the law of 1828 all other rules of practice are abolished.

Harrod, last called in warranty, demands a rescission of the sale for non-payment of the price, as well under act 2539, *Louisiana Code*, as the express stipulations of the sale, also *Louisiana Code*, 1920, 2041-2.

Endorser subrogated to vendor's right, may rescind sale. 2 *Martin, N. S.*, 159. 3 *Ibid.*, 314. See also, 7 *Ibid.*, 400. 2 *Ibid.*, 519. 10 *Toullier, chapter 6, section 3, article 1, No. 492, &c.*

Right of rescission indivisible. 6 *Toullier, page 806, No. 778*, and contract, gives vendor's rights to endorser, paying any of the instalments.

*Mazureau*, on behalf of Wm. Cecil, in conclusion.

May it please the court, it is not my intention to take much of your time, after the long and able arguments which you have already heard. This cause is, certainly, as it respects the amount of property and the number of persons that are to be affected by its final decision, one of the most important ever brought before you; but, in my humble conception, few, very few questions are necessary to be examined into, to enable your honors to pronounce a just, a correct sentence. Such was my opinion from the very first moment that I was consulted by my client; and, after having read the twenty-three points, which have been filed by the adverse counsel, I remain confirmed that it was correct, and that they might of course have spared to themselves the trouble of searching for and referring us to the numberless authorities they have quoted in support of them. I expressed that opinion and went somewhat further: I said, that the few questions on the solution of which depends the judgment of this mammoth cause, must be decided in favor of the defendant; that law, justice and equity, are most clearly on his side; and that nothing but a total error as to the laws by which we are to be guided could, for a moment, lead any disinterested and well informed lawyer into the belief, that the plaintiffs had any reasonable chance of success. Was all this error or presumption in me? The court will shortly be enabled to decide.

I shall not trouble the court with any statement of facts of my own. I am perfectly satisfied with the one furnished by the plaintiffs with their printed points; I shall, therefore, enter at once, into the legal merits of the cause. Let me be allowed, however, to remark, that the first point made or presented on behalf of the plaintiffs, conveys an idea which is somewhat incorrect. That point says:

1. "The defendants claim a title derived from the ancestor of the plaintiffs. They consequently cannot contest its validity, nor set up an outstanding title with which they do not connect themselves. The burden of the proof is with them, to show that the title of the ancestor has been legally divested."

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As to my client in particular, I say, may it please the court, that he CLAIMS nothing. He is sued and defends himself. The plaintiffs *claim* the property which he is in possession of, and in his answer to their petition, he first denies that they have any right or title to it. He in the next place avers, that the estate or succession of John Poultney, the father of the plaintiffs, has been legally divested of the property which they claim from him. Then he adds, that he has *bonâ fide* purchased the said property, from a person who is bound to defend and warrant him, and prays that his vendor may be cited to that effect. Such is the defence which I propose to make good.

How does it stand in point of fact?

Let us open the printed statement made by the adverse counsel, and we shall see, page 2, that on the 13th of March, 1820, George Lloyd, Henry Foster and P. V. Ogden, were, at a meeting of the creditors of John Poultney, deceased, ordered by the First District Court of this state, appointed syndics of the said creditors; and that on the 14th, they were authorised by an order of court, to take possession of the property, and sell the same according to law. We shall see further, page 3, that the property was sold by the sheriff to George M. Ogden, pursuant to an order of the court, made on a certain hypothecary action brought against the said syndics, on the 13th day of June, 1820.

From these plain facts, ought not the plaintiffs to be at once turned out of court, and judgment entered in favor of the defendant?

The decision of this question, depends only on the solution of the two following, to wit:

1. Are the proceedings and the orders of the District Court, respecting the *concurso*, delivery of possession and sale, valid?

2. Are the proceedings before the same court, and the order of seizure and sale granted against the syndics, on the executory or hypothecary action of George M. Ogden, Peter V. Ogden and Charles Harrod, and in consequence of which the above alluded to property was sold, good and valid in law?

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As to the first of those questions, the plaintiffs contend :

1. That the District Court had no jurisdiction.
2. That the minor children of John Poultney ought to have been cited to answer the petition, praying for a meeting of the creditors; that no citation ever issued, or ever was served upon them; and that they were in no manner made parties to any of those proceedings: for which reasons they say all the proceedings of the *concurso* are null and void, and they were never legally divested of the property in dispute.

They contend, as to the second question, that the sale made by the sheriff, on the 13th of June, 1820, to George M. Ogden, from whom the defendant derives his title, is null and void, because :

1. The District Court was incompetent, and had no jurisdiction of claims for debt against the estate of a deceased person.
2. No order of seizure and sale could issue, until the act importing confession of judgment, had been declared executory against the heirs.
3. The order of seizure and sale issued irregularly, because the parties applying for it, prayed at the same time for citation and judgment against the syndics, which was an abandonment of the *via executiva*.
4. Mrs. Poultney was never served with a citation.

Let us examine the two questions, and the propositions contended for by the plaintiffs, separately.

As it is contended on both questions, that the District Court had no jurisdiction, and could neither order a meeting of the creditors of the deceased, nor take cognizance of an action of debt against his succession, what I am now going to say respecting the jurisdiction, will apply to the one, as well as to the other of the cases.

I say, may it please your honors, that the District Court had jurisdiction; and that it is a palpable error to deny it and to contend that the Court of Probates was alone competent.

Have the counsel for the plaintiffs forgotten, that the statute of 1813, organizing "the Supreme Court of the state of Louisiana, and establishing courts of inferior jurisdiction,"

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says, section 16 : "that the proceedings of the said District Courts, in civil as well as criminal cases, shall be governed by the acts of the territorial legislature, regulating the proceedings of the late Superior Court of the territory of Orleans, and that they shall have the same powers," &c.?

Does not this statute most clearly give the District Court the same jurisdiction which the Superior Court of the territory had ? If in saying that the proceedings in civil cases should be the same, and the *powers* the same, the legislature meant to say that the jurisdiction should be different, I wish I may be informed, in what manner it could provide that it should be the same. I may be answered, that the idea or intention, would have been better expressed, if, instead of the language made use of, it had said in fewer words, "the mode of proceeding in the said District Courts, and their jurisdiction, shall be the same as the mode of proceeding and the jurisdiction of the late Superior Court of the territory of Orleans." But I would ask if any other meaning can reasonably be attached to the statute, as it is, than that expressed by the words I have just uttered and put together. Until this is satisfactorily shown to me, I shall, as I do, contend that the statute of 1813, gave to the District Court which it created, the same jurisdiction, which the late Superior Court of the territory had.

Our next inquiry must therefore be, would the Superior Court have had jurisdiction of the matters which are the subject of the present controversy ? I say yes ; because by the act of Congress creating it, section 5th, Congress had given it jurisdiction of all cases where the thing in dispute, exceeded in value, the sum of one hundred dollars. And as to the Court of Probates, which was created by an act of the governor and legislative council of the territory, approved on the 3d of July, 1805, posterior to the act of Congress just alluded to, can it be said that it had any jurisdiction at all, of the matters which gave rise to the present controversy ? I deny it.

Let us look at the act of 1805, just referred to, and we shall see that the Court of Probates was vested with the power of

opening wills, granting testamentary letters, and letters of administration, and with no other. It had not even the power of appointing tutors or curators.

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Let us next open our old Civil Code, which was in full force at the time of, and long after the death of John Poultney, and consequently when the proceedings were had, the nullity of which is contended for by the plaintiffs; we shall see that the Court of Probates is not even mentioned in any part of it. Vainly would we look into it therefore, to find any provision giving to that inferior court any jurisdiction at all; unless the word JUDGE which it uses wherever it treats of tutors, curators, successions accepted under the benefit of an inventory, administration of vacant estates, testamentary executors, &c., be made to signify *Court of Probates*; which I presume will not be attempted, even in this age of wonders. But admitting that *judge* means *Court of Probates*, does it also signify, that exclusive jurisdiction of the matters under consideration is given to it? And if it does, what of it? Could the legislative council, or the legislature of the territory of Orleans, as long as that form of government existed here, pass a law giving such exclusive jurisdiction to the Probate Court? I humbly presume they could not. The Superior Court, organized here by an act of Congress, held its jurisdiction from an act of Congress. Could that jurisdiction be taken from that court? No doubt that it could; but by what authority? By an act of Congress and not by an act of our territorial legislature. Am I not safe, therefore, in saying, 1st. that the jurisdiction contended for, was never given to our Court of Probates. 2d. that if it had been given by any law of our own making, it would not have divested the Superior Court of a particle of its own power or jurisdiction?

Let us recollect that in December 1819, the Supreme Court of the state of Louisiana have, in the case of Abat et al. vs. Songy, 7 *Martin*, 277, decided and declared, that the Court of Probates could not take cognizance of a suit brought against a succession.

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Let us next bear in mind that one month had hardly elapsed after that solemn decision, when Messrs. Duncan and Grymes have, in the name of three of the creditors of the deceased John Poultnay, presented to the District Court, a petition, praying for a meeting of all his creditors, in order to have syndics appointed for the purpose of administering the estate *for the benefit of all concerned.*

If it is contended that the District Court was incompetent, to what court could those parties apply? to the Court of Probates? Certainly not; for the decision in the case of *Abat vs. Songy*, would not have justified such a step. Were they to apply to the Parish Court? no such thing will, I hope, be dreamed of. They were undoubtedly to apply to the District Court; they could apply to no other.

But, say the plaintiffs, the Supreme Court have in the case of *Vignaud vs. Tournacourt*, decided that all suits or actions against a succession must be brought before the Court of Probates and not in the District Court. True it is; but when was that decision made? in August, 1822. Now, I ask every man in his senses, who is not blinded by prejudice or interest, if any argument against the validity of the proceedings had in our case, can be reasonably drawn from that decision?

What! when I see in January, 1820, that in the preceding month of December, the supreme judicial tribunal of the state have solemnly declared, if not to all the world, at least to me and my fellow citizens, that the Court of Probates had no jurisdiction of suits brought against a succession, am I to imagine or presume that they were wrong? Am I to foresee that twenty months thereafter they shall change their mind, although the law is not changed, and declare that the Probate Court has exclusive jurisdiction?

May it please your honors, I will not presume to criticise the decision rendered in the case of *Vignaud vs. Tournacourt*. I will not undertake to say that it was founded in error; but I will candidly tell you that I was much surprised when I read it. I went perhaps too far, when I said, that at the

time it was pronounced, the law had not been changed. I know that on the 18th of March, 1820, an act of our state legislature was approved, which gave jurisdiction to the Court of Probates in all cases relating to the proof and execution of wills, the appointment of curators of vacant estates, absent heirs, minors, and other persons tutors of minors, the settlement, liquidation and partition of successions, the liquidation and payment of all claims against a succession, either vacant or accepted, under the benefit of an inventory, &c.

But the passage of this act, which was not promulgated until three months after its date, proves most conclusively, to my mind at least, that, had it not been for its enactment, the Court of Probates would have had no jurisdiction. It is clear to my conception, that in December, 1819, January, February, March, April, May and June, 1820, such jurisdiction did not exist in that court; for I believe I may safely say, that until a law is promulgated, it is not in force, nor is it binding upon any person. I therefore feel confident, that proceedings had in the District Court before its passage and promulgation, can in no manner be affected by any of its provisions.

Can it be said that I am wrong in this? I believe I can even go farther, if this statute is properly understood. Let us read it. It says: "The Court of Probates shall *have jurisdiction*," &c.; not *exclusive jurisdiction*; let us bear it in mind. I say, that as the jurisdiction was already vested in the District Court, the statute, worded as it is, did not take it away from it; that it kept it concurrently with the Court of Probates, to which, for the first time, the law gave it. Such is, in my humble opinion, the only just construction that can be put upon the act of March, 1820. To make it say, that the Court of Probates was to have *exclusive jurisdiction*, when it only said, "the Court of Probates shall have jurisdiction," would be going somewhat beyond the power of construing it; it would be a usurpation of the power of amending, which, thanks be given to God, our constitution has not given to the judiciary branch of our government. I am, therefore, confident that the court will agree with me, in declaring, as I do, that not only prior to, but even after the

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passage and promulgation of the act of 1820, the District Court had jurisdiction of all the matters which are the subject of the present controversy.

This is not all, may it please your honors; I say that if it were possible that you could differ with me on these points, you would still be bound to declare that all the proceedings are legal and valid; and I will now proceed to demonstrate it.

Let us recollect that, prior to his death, John Poultney, finding himself unable to pay his debts, was reduced to the necessity of going into court and to apply for one of the remedies provided by our laws for the relief of debtors in failing circumstances.

He made his *bilan* and filed it in the District Court, with a petition praying for a meeting of his creditors, in order to ask from them a respite. The *bilan* being sworn to, the District Court ordered the meeting prayed for; and, at the same time, did, according to our law, order a suspension of every proceeding both against the petitioner and his property. The meeting did accordingly take place; the respite was granted; and the deliberations had on the subject, by the creditors, were, on the application of the petitioner, homologated by the court.

Now, pending the respite, and before the expiration of the first instalment, John Poultney died, without having paid a cent of his debts.

Under these circumstances, I say, that the creditors, or any other person connected with the proceedings of the respite, could for no purposes whatever go to any other than the District Court.

Your honors know, as well as myself, that a *respite* is always, if not with respect to all, at least with respect to some of the creditors of the insolvent, a delay which they are compelled to grant him: when the majority consents, the minority is forced to submit to it. But, may it please your honors, upon what condition is it that the law tells a creditor: "Thou shalt not trouble thy debtor for the payment of thy claim, until after the expiration of the time granted to him by his other creditors?" It is upon this

condition, that the insolvent, who has obtained the respite, shall pay all his creditors at the expiration of the delay. Does not the insolvent, when he goes to his creditors, before the notary, tell them: gentlemen, I am unable at present to pay you; but if you will give me some time, say one, two, and three years, I promise to pay you all? So he does. Then the creditors deliberate, and, after the vote of each is taken separately, those votes are counted. An act is drawn by the notary, and signed by him and all the parties; that act is returned into court; and, on the filing of it, and on a motion of the insolvent, public notice is, by the court, ordered to be given to all parties concerned, to show cause, within a certain delay, why the proceedings should not be homologated. If sufficient cause is shown, no *homologation* takes place, the respite is not granted. If, on the contrary, no cause or insufficient cause is shown, the proceedings are homologated, the respite is granted; and the stay of proceedings ordered on the filing of the insolvent's *bilan*, is extended to the last day of the term or delay fixed by the majority of his creditors. During that term or delay, and as long as the stay of proceedings is not set aside, the dissenting minority of the creditors have their arms and tongue tied up: they can neither act or speak against the debtor in any court of justice, respecting their individual claims, unless he dissipates or conceals his property in fraud of his creditors. See *Villadiego*, page 53, No. 166. *Febrero juicio de concurso*, lib. 3 chap. 3, No. 243.

Such is, may it please the court, the meaning, the full and only meaning of these few words: "Let the proceedings be homologated," which the judge on those occasions pronounces. These words are a solemn judgment of the court, by which the insolvent is condemned to pay his debts at the end of the delay by him asked of, and to him allowed by the majority of his creditors; and by which all the dissenting as well as the consenting creditors are estopped from exacting their claims until the expiration of said delay. See *Villadiego*, page 53, No. 170. That judgment of the court, may it please your honors, like every other judgment of a court of

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justice, must be complied with, it must be executed and carried into effect.

If this is correct, and I am confident it is, then such a judgment existed against John Poultney at the time of his death.

What was then to be done? If he had continued to live, and had failed to fulfil that part of his obligations imposed upon him by the judgment, could he have prevented the necessary process, to compel him to do it, from issuing? Certainly not. *Pasado el término de la espera puede ser apremiado a pagar*, says *Villadiego*, page 53, No. 167. I shall be asked, perhaps, in what manner he could have been *apremiado a pagar*. The answer to this is far from being a difficult one. I say, that several modes of carrying the judgment against him into effect, existed.

In the first place, the *deliberations* before the notary, as we call them, are nothing but what the French call a *concordat* and the Spaniards a *convenio*, sanctioned by the judge, by which the debtor binds himself to pay his creditors what he owes them at the end of a stated period; and which binds him and his property. To show that such *concordat*, *convenio*, is a contract that binds him, no authority I hope will be required to be referred to; and reason, common sense and law, unite in telling us that it binds his property. When an insolvent debtor applies to a court of justice for a respite, he annexes to his petition a schedule or *bilan* of his debts, assets and property. Both the petition and *bilan* are sent before a notary, at whose office the court orders the creditors to meet together on a certain day. There the debtor or his attorney, appears before the creditors; and after stating to them the causes which have produced his embarrassments, to acquaint them with his resources, he tells them: Look at my schedule; it shows what I owe; and, also, the debts due to me, and the property which I possess. With those debts, when collected, I shall pay you. If not collected, or insufficient, my property will be there to answer for your claims. The creditors, upon this, grant the respite, or a portion of them refuse it; if a majority only grant it, recourse is had, as I

already said to the court, to compel the minority to abide by the will of the majority. See *Villadiego ut supra*, No. 170. From the moment that the court has *homologated* the respite, the insolvent has no right to dispose of any of his means, or to pay any one of his creditors to the prejudice of, or in preference to the others. If he does it, an action called *revocatoria*, lies in favor of the mass of the creditors to have the whole annulled; and upon this action, things are replaced on their former footing. See *Curia Philippica, verbo revocatoria*, No. 25. It is from this, may it please the court, that I say, that reason, common sense and law, unite in telling us that the *concordat, convenio*, or contract, between the insolvent and his creditors, binds and affects his property. Is it not obvious to your minds, as it is to mine, that if it was not for the kind of security which the creditors find in the property described in the *bilan*, they would not grant the respite? Is it not the promise thus made to them, either tacitly or expressly, by the insolvent, to pay them out of his property, which induces them to grant the respite? Does not the petition and *bilan* make part of the act by which the respite is granted? Then, I say, that this notarial act has all the characteristics, unites all the requisite circumstances which constitute that description of obligations, which by our Code of Practice carries *aparejada ejecucion*; that is to say, upon which an order of seizure and sale issues immediately.

This then, I contend, is one of the modes which the mass of the creditors have, in order to carry into execution the judgment of the court, by which the *concordate, deliberations* have been homologated.

Now, as to the second mode, I have no doubt in my mind that it may be resorted to also: for, if what we call the *homologation* of the concordate or deliberations, is, as I am confident it is, a judgment of the court, by which the debtor is bound to pay his creditors, at the expiration of the time which they are obliged to suffer to elapse before they can claim any thing, I ask what can prevent a *fieri facias* from issuing for the benefit of the mass of the creditors, as soon as that time is passed. May it please your honors, the

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judgment of homologation in such case, is nothing more nor less than a judgment entered by consent, on the part of the debtor, with a stay of execution until a fixed period of time.

Could John Poultney, if he had lived, have prevented either the one or the other of these two modes of forcing him to pay his debts, from being resorted to, if he had not paid his creditors at the end of the first instalment? Could he have stopped them by any legal formality? No, not even by tendering a cession of his property; for he who has already had the benefit of a respite, cannot afterwards be admitted to the benefit of the *cessio bonorum*: he must pay his debts or go to jail. So says *Villadiego*, page 53, No. 167.

There remained nothing unsettled between the insolvent and his creditors. His debts to all and each of them were ascertained and proven in the most unequivocal manner, by his own oath at the foot of his *bilan*. No new suit or action, therefore, was necessary to be resorted to; all that was to be done was to carry the judgment of homologation into effect; and I say, without fear of contradiction, that the District Court, who had rendered that judgment, was the only one that could be applied to in order to enforce it.

Could those persons, called by law to be his heirs, have any more right than he had himself? Could their situation be different from his own? I say, may it please your honors, that, unless they, at once, came forward and accepted his succession purely and simply, and made, not only his estate, but their own persons and property, liable for the whole amount of his debts; they could not even avail themselves of the respite granted to him by his creditors, although that *respite* had been homologated (approved) by the court. So says Febrero, who has almost constantly been our only and safest guide in these matters. Let me be permitted to quote here his very words: "*No aprovecha*, says he, *la moratoria á los herederos del deudor, que estando pendiente, fallecio, si aceptan su herencia con beneficio de inventario, aunque el juez la haya aprobado; y la razon es, porque como por esta aceptacion es visto no querer obligarse ultra vires hereditarias, no hay materia sobre que recaiga; y así pueden los acreedores proceder contra*

*la herencia, sin aguardar á que espire el término concedido.*" See book 3, chapter 3, section 2, No. 243 (*de consurso*).

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Had the present plaintiffs accepted the succession of their father John Poultney, purely and simply, at the time that an application was made by his creditors to have syndics appointed in order to administer his estate *for the benefit of all concerned?* No, nor could they accept it in that manner; for they were minors, and the law most expressly forbade tutors or curators of minors to accept any succession for them otherwise than *con beneficio de inventario*.

I believe, may it please the court, that I have shown satisfactorily, *first*, that the District Court had concurrent jurisdiction with the Court of Probates, of actions against a succession for the payment of debts due by it. *Second*, that the cause of the *concurso* was, in a great measure, still pending before the District Court at the time of Poultney's death. *Third*, that the judgment of homologation, rendered by that court, was nothing more nor less than a judgment entered by consent of the debtor, with a stay of execution. *Fourth*, that, after the delay, execution must issue: that is to say, the judgment must be carried into effect. *Fifth*, that the court who rendered this judgment was the only one which could be applied to by the creditors to have it enforced. *Sixth*, that the plaintiffs in this case could not claim the benefit of the respite. *Seventh*, that they could not, therefore, prevent, by any legal proceedings, the creditors from having their judgment carried into effect against the succession of their deceased father. Enough, then, on the question of jurisdiction.

But the plaintiffs' counsel have contended that the passage just quoted by me from Febrero, applies only to the cases when the respite was granted by the king, which is, they say, called *moratoria*; and that it does not apply to those cases (such as ours,) where the respite is granted by the creditors themselves, which is, properly speaking, the *espera*: that the former does not avail the heirs, because it is an act of power, done without the consent or participation of the creditors, and must, therefore, be personal; whilst the latter

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is granted by the free will of the creditors themselves, and is, therefore, like every other contract, to inure to the benefit not only of the debtor, but of his succession also.

This, may it please the court, is all founded in error. In the first place, *moratoria* is a generic term, and so is *espera*; both are synonymous, and used indifferently to signify that delay which we call *respite*, whether it be granted by the king or by the creditors. In the next place, a *respite*, or *moratoria*, or *espera*, in which the sanction of judicial proceedings is required, is never a voluntary act on the part of all the creditors. It is voluntary on the part of the consenting majority alone: it is forced—always forced, as it respects the dissenting minority. It is because of the refusal of some, that recourse is had to courts of justice. Where would be the necessity of any such recourse, if all the creditors were willing to grant the *espera*, the *moratoria*, the *respite*—call it as you will? Is it required to refer the court to any authority to support this plainest of all propositions? Then look at *Villadiego*, page 53, No. 165; look at *Febrero*, [concurso] book 3, chap. 3, sec. 3, Nos. 238, 242; look at the *Curia Philippica*, *verbo esperas*, No. 3; look at the 5th *Partida*, law 5, title 15.

I beg leave to say here, that I was very much surprised, indeed, when I heard it contended—seriously contended, that *moratoria* was the delay granted by the authority of the king, and *espera*, the delay conceded by the creditors themselves. I never did apprehend that gentlemen, well versed in the Spanish language, and in the knowledge of Spanish law terms, would ever advance such an erroneous proposition.

Let us turn to the authorities just referred to; we shall see that the *Curia Philippica*, under the head of *Esperas*, says, No. 1: “*Aunque no vale el rescripto del príncipe, en que remite la deuda al deudor, empero vale el en que le concede espera.*” The same book says, No. 2: “*No teniendo el deudor bienes suficientes para la paga de sus deudas, antes de hacer cession de bienes, y no despues puede pedir, á sus acreedores esperas por un plazo señalado.*” No. 3: “*Si todos los acreedores, no se conformaren en uno en conceder la espera vale en concediendola la mayor*

*parte; en los cuales casos los que no conceden la espera estan obligados á pasar por lo que hicieren los que la conceden," etc.*

Here we see but one word, the word *espera*, used by this most respectable book, to express both the delay granted by the authority of the prince, and the one conceded by the creditors.

Villadiego, page 53, No. 165, 166, 167, 169, 170, uses also the word *espera* and no other, to signify both the delay asked and obtained from the king, and that demanded of and conceded by the creditors.

Febrero on the contrary, almost always makes use of the word *moratoria*, to express both these *delays* or *respites*.

In his No. 232, *loco citato*, he says : " *De los quatro generos de concursos propuestos en el N°. 1, de este capitulo, el tercero en el orden es el de espera ó moratoria, que el deudor pide al rey ó á su consejo en su nombre, ó á sus acreedores.* In his No. 237, he says: " *Está destituido de potested y facultades el consejo de hacienda para conceder esperas ó moratorias.*"

In speaking of the *delays* granted by the king or in his name, he calls them *moratorias de gracia*. See No. 234.

In speaking of that conceded by the creditors, No. 238: " *La otra clase de moratorias es quando los acreedores á deprecacion del deudor le conceden algun tiempo, á fin de que en su intermedio proporcione el pagamento de lo que les debe; y ésta se llama vulgarmente espera de acreedores.*"

So we see, that *legalmente*, legally speaking *moratoria*, according to this writer, is the term by which are signified both the delay obtained from the king, and the delay obtained from the creditors.

Shall we consult the dictionary of the Spanish Academy ? We shall read: " *Mora (substantivo femenino forense) dilacion otardanza—Moratoria—s. f. espera concedida por el rey, etc., which has evidently for its root the word *mora*.*

Perhaps all the law writers above referred to, and the Academy itself are mistaken: it may be that the gentlemen on the other side understand Spanish better than they do. Then let us see how the lawgiver himself speaks it; I believe we may be safe in using his own expressions.

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In the 15th law, title 5th, book 2d. of the Recopilacion de Castilla, the king says: *Ordenamos, y defendemos que los oidores, no den ni libren á persona alguna, cartas de espera de sus deudas, &c.*

In the Autos Acordados, book 2d., title 4, Auto 79, the lawgiver says: "Luego que se pida moratoria por qualquiera interesado mandará el consejo, &c.

Let us then boldly repeat, that *espera* and *moratoria* are synonymous terms, which both signify a *respite granted either by the king or by creditors to a debtor who finds himself unable to pay his debts.*

Indeed, I cannot conceive how that could be for a moment disputed or even doubted. Did not the gentlemen, and does not the court see, that the passage of Febrero which treats of the effects of the *moratoria*, as it respects the heirs of the insolvent, cannot possibly bear the construction which was on the part of the plaintiffs, attempted to be put upon it? Let us read it again. It says: "*No aprovecha la moratoria á los herederos del deudor, que estando pendiente falleció, si aceptan su herencia con beneficio de inventario, aunque el juez la haya aprobado; y la razon es porque como por esta aceptación es visto no querer obligarse ultra vires hereditarias, no hay materia sobre que recaiga; y así pueden los acreedores proceder contra la herencia sin aguardar á que expire el término concedido!*"

Before saying that this applies only to the *moratoria* granted by the king, would it not be absolutely necessary to show that such a *moratoria* needed, after being granted, the approbation of a judge? Where is the man, in his right senses, that will feel disposed to say that it did? We might as well say that the power of the king of Spain was inferior to that of a judge, or subordinate to it in those matters. Did not the gentlemen see, and does not the court know that, in Spain, the *moratoria* could be obtained in two ways? The one by applying to the king, the other by applying to the creditors. In the first case, do we find in any writer, or in the laws which treat of the power of the king to grant *moratorias*, that, in order that they may be carried into effect,

they must be approved by the judge? Certainly not. Such approbation is necessary only in case of a *moratoria* asked of the creditors, when some of the latter refuse, and the majority are willing to grant it. Then and then only, recourse is had to the judge, to have the minority compelled to abide by the will of the majority. So say all the law writers; and nothing to the contrary can be shown.

But it is said that the *heirs* of John Poultney ought to have been cited, when the application was made by three of the creditors, to have a meeting of them all for the purpose of appointing syndics.

May it please your honors, there is no more foundation in law for that proposition, than for all those which I have already had under consideration.

In the first place, there were indeed persons called by law to take, as heirs, the estate of the insolvent, after his death, to wit: his children. But they never were his heirs, until after the incipiency of the present suit, to wit: in March, 1833; at which time his succession was accepted for them, as minors, under the benefit of inventory.

But up to the latter period, that succession was vacant; for nobody presented himself to take possession of it, either as heir or under any other title. *Old Civil Code*, 172, article 118.

In the next place, the same code, 160, article 71, says: "Nobody can be compelled to accept a succession, and may, therefore, accept or repudiate it." Hence, it results that no man can be said to be the heir of another, as long as he has not, by his acceptance, declared that he is.

In the third place, the children of John Poultney, who died insolvent, had no interest whatever in the settlement of his succession: that is to say, in admitting that they were *his heirs* without having accepted his succession, they could receive nothing from it, until after the payment of his debts; and, as to those debts, they were already liquidated by his sworn *bilan*, and by the judgment of homologation of the respite he had obtained. In what capacity, therefore, could they have been cited? and for what object? The propor-

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sition contended for by their counsel, is evidently founded upon the wrong supposition, that as soon as a man dies, those that are by law called to inherit, are at once vested with all his rights and titles, and also bound to discharge all his obligations, and do in every respect, represent him. Such was and such is, may be, at present, the law of France; but such never was the law here, before, not at the time of the death of John Poultney. On the contrary, until accepted or claimed, a succession remains vacant, as we have just seen; and until accepted or repudiated, the same is considered as a fictitious being, representing, in every respect the deceased. So says the *old Code*, 162, article 74.

These principles are not new. They are as old as the Roman law. See *Justinian's Institutes*, lib. 2, tit. 14, 32, and *Salgado Laberint. Cred.*, part 1, chap. 32, page 219, No. 3.

Besides, the children of John Poultney were minors, and the law did not permit them, or their tutors or curators, to accept a succession otherwise than under the benefit of inventory. See *old Code*, 163, articles 80 — and 71, articles 62 and 63.

I contend, therefore, that it would have been most irregular and useless to have had those children served with any citation. Let us recollect that Febrero tells us, that the *respite* is of no avail to the heirs of the debtor, who dies during its pendency, if they accept his succession under the benefit of inventory; and that the creditors may at once proceed against the succession, without waiting for the expiration of the said respite. What is the plain meaning of this? Is it not that the *heirs* do not represent the deceased unless they accept the succession purely and simply, and thereby render themselves and their own property liable for the payment of all his debts? Is not the plain meaning of this, that the heir who accepts under the benefit of inventory, remains, when the respite obtained by the deceased is still pending, a total stranger to the succession? Yes, may it please the court, the heirs, in such case, under such circumstances, are beings totally distinct from the deceased and his succession. The contrary cannot be admitted or sanctioned without violating our clearest laws.

The children of John Poultney, therefore, could not be sued; and if they could not be sued, they could not be cited.

The estate, the succession of the deceased, a fictitious being, it is true, but a being in the eye of the law, and by the will of the law, was the only *person* that could be sued; and the creditors had a right to sue it.

Now, may it please the court, what did the creditors do? I have shown, I believe satisfactorily, that they might have had at once, an execution issued, or an order of seizure and sale, to have the property left by the deceased, sold to satisfy their claims, which were liquidated by both the *bilan*, sworn to by their debtor, and the judgment of homologation of the respite:

In order to attain this end, three of them, acting most evidently for the interest of all, have presented a petition, stating the insolvency and death of John Poultney, and the renunciation of his widow to his community, and praying that a meeting of all the creditors be ordered, for the purpose of appointing syndics to administer the estate for the *interest of all concerned*.

This mode of proceeding is, as the court knows, a kind of *concurso de acreedores*, which is properly called *ocurencia, ó pleito de acreedores*. It may take place, *first*, when the property of a debtor is seized by some of his creditors, and the others intervene and pretend to be paid in preference. *Second*, when the debtor is dead, and creditors present themselves before the court in which his succession is opened, in order to have their claims satisfied. *Third*, when creditors proceed against the property of their debtor, in consequence of his having fled, or of his being insolvent. This proceeding is also called *concurso necesario*, and is had *con total independencia del deudor*; that is to say, without making the debtor a party to it. So says *Febrero, de concurso, book 3, chap. 3, sec. 2, No. 39.*

But, say the plaintiffs' counsel, "John Poultney did not die insolvent. His schedule upon which he obtained the respite, showed that his assets and property amounted to more than his debts."

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Yes, his schedule showed all that. But why did it show it? Because he had thought proper to enhance as much as possible the value of his property, in order to inspire in his creditors some more confidence than they might otherwise have had, in his means to satisfy them, had he put his assets and property down to their real worth or value. Such an argument is entitled, in my opinion, to very little weight, particularly when we see that it is the daily practice of *gentlemen*, who are (God knows from what cause) real bankrupts, to present to their creditors *bilans*, which make them appear perfectly solvent

What better evidence could we wish to have of the total insolvency of John Poultney, than the renunciation of his community on the part of his widow, one of the plaintiffs, shortly after his death? That renunciation is here on record. Such an act, may it please the court, never takes place when a married man dies rich. It is never made except in cases of undoubted insolvency; for its only object is to rid the widow from the obligation of paying the debts of the married couple, and to enable her to take back, out of the mass of the community, and free from all charges, what she had brought into the marriage. Indeed, the assertion that John Poultney did not die insolvent, comes with but very little grace out of the mouth of his surviving lady, after such a renunciation.

Again, may it please the court, was not John Poultney an insolvent debtor in the eye of the law, when he called for a respite? See *Civil Code*, 439, article 1. *Curia Philippica, verbo falidos, No. 1 and 3.* No lawyer is permitted, legally speaking, to call him otherwise than *insolvent debtor*.

Let us say, if we wish to show ourselves friends to truth, that, unfortunately for himself and family, and for his creditors, John Poultney, junior, was insolvent—perfectly insolvent when he departed this life, to go and present his general *schedule* before the throne of the Almighty.

Then, I say, that the proceedings of the *ocurencia* were justly and properly resorted to; and that nobody has any right to object to the want of citation to the children of the

deceased; for, if he had been alive and had not satisfied his creditors, after the expiration of the first instalment fixed by the respite, those proceedings would have, most legally, taken place against his property, "*con total independencia suya*," without making him a party to them.

The plaintiffs' counsel refer us to Salgado, to show the necessity of citation to the heirs, when proceedings are intended to be instituted against a succession which has not been accepted.

I know, may it please the court, that Salgado says: "*creditor qui cum hæreditate contendere vult, qualitate et conditione ejus perquirere et indagare tenetur, ne judicium reddatur illusorium et irritum*: I know that he says also, that when there is an heir instituted *iste nominatim et specialiter erit citandus*; but, for what purpose? "*erit citandus et requirendus*," says he, "*pro declaracione an adeat vel repudiet hæreditatem intra terminum sibi a judice prefixum*." I know that this writer says, that when it is uncertain that there are heirs, either in consequence of the one instituted having renounced, or because the deceased made no will, and the legal heirs are unknown, they must be called upon by *proclama*, public advertisements; and that, if, after this is done, no one appears who accepts the succession, a curator is to be appointed to it.

Was all that necessary? Most undoubtedly, my client is not, and cannot be made to bear the blame; he cannot, and ought not to suffer if it was not all done. He was not a party to those proceedings of the *ocurencia*, nor was he employed by the petitioner as counsel to institute them.

If all that was absolutely necessary, why was it not done? My friend, Mr. Grymes, who is now one of the plaintiffs' counsel, and who was then one of the attorneys who signed the petition for the *ocurencia*, is, I suppose, better able than any of us here, to inform us of the reason why all that was not done.

I am sure that he will, with his ordinary candor, tell us that he does not know it very well himself. The fact is, may it please your honors, that at the time these proceedings

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were had, Salgado's works were but very little known, if they were to be found (which I sincerely doubt myself,) on the banks of the majestic Mississippi.

But I will add, that, had Salgado's most valuable works been better known and better understood, no better or more legal proceedings could have been had than those of the *ocurencia*, such as we have them. Why?

Because it was entirely unnecessary to cause minor children to appear and declare, by themselves or their tutors, whether they would accept or repudiate the succession of their fathers, when the law tells us, that they cannot accept otherwise than under the benefit of inventory; and when the law tells us also, that the heirs who accept under the benefit of inventory the succession of a debtor who dies during the pendency of a respite, cannot avail themselves of the benefit of it, and that the creditor may at once proceed against the *succession (la herencia)* without waiting until the expiration of the *espera, moratoria, respite*.

But, it is said, "the old Code said, that previous to proceeding against or suing a vacant estate, a curator is to be appointed to it. So says the Code, and I say, that this requisite has been complied with.

The petition for the *ocurencia*, may it please the court, was not a proceeding against the succession. No remedy is asked against it. The only object of the prayer of the petitioners is, that the creditors be called together, to appoint syndics to administer *for the interest of all concerned*. Now, what is the difference between syndics and curators? There is none. Febrero tells us, that the *administrador* of a *concurso* (whom we have been pleased to call a syndic) is the same as a curator *ad bona*, and that his powers and faculties are, in every respect, the same; and Salgado, page 221, No. 46, tells us, that procurators', syndics' and administrators' acts, are binding against the succession which they represent; thus showing, that no difference exists between a *syndic* and a *curator*, except as to the name.

"But," say the plaintiffs, "the judge was to appoint the syndic or curator": no doubt; has not the judge appointed,

or done what is tantamount to his having appointed the syndics in our case? Certainly; for he has sanctioned their appointment upon the return made into court of the deliberation of the creditors; and, upon the filing of a petition or upon a motion, on their part made and signed by my friend Mr. Grymes; he has also, ordered them to be put in possession of all the property belonging to the deceased insolvent, and to sell the same according to law.

So we see, that before any step is taken against the estate, curators are appointed to administer it for *the interest of all concerned*; and that when they are appointed and confirmed, they are put in possession of the estate and authorised to sell it.

Then I say, that every thing which both the Code and Salgado required, has been punctually and faithfully done; and I conclude, that the succession of John Poultney has, by the taking of possession, and by the sale of the land in controversy, been divested, legally divested of that property; and that the plaintiffs, who are bold enough to come after so many years, and claim it in consequence of their but very recent acceptance under the benefit of inventory, have and can have no right to any particles thereof.

But, say the plaintiffs' counsel, the return of the sheriff's sale to George M. Ogden, dated June 13th, 1820, was not made until the 18th June, 1823!

What have we to do with the sheriff's return? Was that return necessary for the validity of the sale? Most undoubtedly not.

But it is objected, that the sheriff's deed of sale to the said Ogden, says, "that he sold all the *rights* and *title* of John Poultney, and makes no mention of the *rights* and *title* of his *children*!"

Certainly, and what could that bill of sale say more consistent with law and truth? Had the children any title or rights in or to the property sold? None that I know; none that can be shown. They had not chosen to accept, in any manner whatever, the succession of their father. They were not his heirs; they were not vested with any

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right or title whatever, respecting any part of his estate: the sheriff, therefore, did not sell or transfer by his deed any thing of their own; and could not, of course, speak in that *deed*, of things which he did not sell or convey.

Let me be permitted to repeat, that nothing but a positive and pure and simple acceptance on the part of the children, could make them heirs of their father, so as to vest them with all his rights, titles and property. See *old Code*, 161, article 71. *1st Febrero Juicios*, N<sup>o</sup>. 109, 110 and 111; and no such acceptance was ever made by order of the plaintiffs.

Before concluding upon this question, I beg leave to offer a few remarks upon an error which, it seems to me, is the most striking of all those that the gentlemen on the other side have fallen into; and it is this:

As I stated before, and as they show it themselves in their own statement of facts, their clients never accepted the succession, except under the benefit of inventory. They evidently believed, and do still believe, that such an acceptance transferred to them all the property of the deceased, since they, in consequence of it, claim it, and make all their best efforts to sustain their *petitoria action* to recover it. I think, may it please the court, that in this the gentlemen are totally mistaken. If such an acceptance could make the acceptor proprietor of the estate, ought it not to make him liable for all the debts due by the estate? Most undoubtedly. And would an action, from any of the creditors of the deceased, now lie, after such an acceptance, against his children personally? Certainly not. The court would say, at once, read the old as well as the new Code of Louisiana; read the Spanish laws from which their provisions on this subject have been borrowed, and you will see that they are not liable personally: by accepting in this manner, they have told you and all the world, that they did not make themselves liable "*ultra vires hereditarias*."

If this is correct, as I am convinced it is, I say, may it please the court, that the law did not give the plaintiffs in this case, the right to claim as they do, in their petition, the property in dispute, as their own. Look at our codes; they

will show you that the only right or power which they confer to, and are acquired by, the heir who accepts under the benefit of inventory, is to administer the succession. He is not, with respect to creditors, legatees, or any persons, the true heir of the deceased, nor the true proprietor of his estate. Nor can he dispose as he pleases of any part of the property; he is a mere administrator, who cannot sell even moveable things without the authorisation of the competent judge; he is bound to furnish security, if required, to answer for his administration, and all the obligations imposed upon mandataries are imposed upon him.

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Then, I say, may it please the court, that the plaintiffs had no right to bring an action of revendication in their own name; no right to claim the property as belonging to themselves. If the property claimed had been wrongfully alienated, if the succession of their father had been illegally divested of it, it continued to belong to, and could only be claimed in the name and for the benefit of that succession. Upon this, therefore, I contend; yes, I contend that upon this alone, the plaintiffs ought to be turned out of court.

Let us pass to the examination of our second question, to wit: are the proceedings in the District Court, and the order of seizure and sale granted against the syndics, on the executory or hypothecary action of George M. Ogden, Peter V. Ogden and Charles Harrod, and in consequence of which, the property in dispute was sold, good and valid in law?

As to the jurisdiction, I have, I believe, already shown that it existed in the District Court: I will, however, add a few words on this subject here. The property subject to the action in that case, was then in the hands of syndics, appointed or confirmed by that court, and subject to the orders and directions of that court, alone. Therefore, no proceedings could take place, either against the property itself, or against the syndics or mass of creditors, in any other tribunal.

"But," say the plaintiffs: "no order of seizure and sale could issue until the act importing confession of judgment

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had been declared executory against his heirs;" and, in support of that, they refer us to the *old Civil Code*, page 200, article 229; and, *page 490, article 7.*

These articles say: "The creditors cannot obtain any execution against the person or estate of the heir, by virtue of a judgment rendered in their favor against the deceased; nor by virtue of any title importing confession of judgment, until they have caused such judgment or title to be declared executory against the heir, which shall be effected by means of the ordinary civil action."

"No seizure can be made on a widow in community, or on the heir, until after having caused to be declared executory against them, the title executed by the deceased or the husband."

May it please your honors, it appears to me that the adverse counsel did not very distinctly understand the law which they took the trouble of referring us to; or, if they did, they must have constantly been laboring under that palpable error which I think I have already rendered so clear, to wit: that the persons who are by law called to be the heirs of a deceased, succeed at once and without any formality to all his rights, titles and property, and are in the same manner vested with every thing that belonged to him before and at his death. Have I not shown that the acceptance of a succession is absolutely necessary to make an heir? Have I not shown that until a pure and simple acceptance there is no heir?

And now, in point of fact, was there any order of seizure or execution obtained, issued or carried into effect, against either the *persons or estate of the heirs*?

Let the plaintiffs show us: 1st. That without any *acceptance* on their part they were *heirs*; 2d. That their *own* property has been the object of the order of seizure and sale in question. Then, this ground of theirs will be supported by the laws which they quote; but, they cannot show any one of these two things; their ground, therefore, is untenable.

The order of seizure was not directed against any property belonging to the plaintiffs. It was directed against property

belonging to the *vacant* succession of their father, which, until accepted was a fictitious being, representing him in every respect, and was defended by syndics who were appointed and confirmed to administer for the interest of all concerned ; and I contend, that so far these proceedings were perfectly correct.

But, it is contended in the next place, "that the order of seizure and sale issued irregularly, because the parties applying for it, did at the same time, pray for citation and judgment against the syndics, which was an abandonment of the *via executiva*."

Unless I am very strangely mistaken, there can be no solidity in this new position. I wish to know where the law is to be found, which says, that "if the executory action and the ordinary one are brought at the same time, in the same petition, the whole shall be null. Would the gentlemen have the goodness to point out that law to me ? No such law exists, or ever existed in this country.

We are only referred to two decisions made by this honorable court, in which exceptions having been taken to proceedings of the same kind, it was ruled that both actions could not be cumulated. This was I conceive perfectly correct, though in my opinion the authorities relied upon by the court did not very clearly bear them out.

The first of these authorities was the *Curia Philippica, via executiva, Nos. 1 and 2; and 3d Febrero Juicios, Nos. 72, 113 and 115.*

I beg leave to read them, and state my reasons for saying that neither the one nor the other did clearly support the decisions of the court.

The *Curia Philippica, No. 1*, says : " *Via executiva* is the way by which we come to the execution and accomplishment of the titles and instruments, which import confession of judgment. It is of its nature brief and summary. It was introduced in favor of the republic, and of the actor and creditor."

It says, *No. 2* : " Hence it follows, that when a man has that kind of action, if he uses it and sues also in the ordinary

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way, he may discontinue this, and stick to the *executiva*, on paying to the defendant his costs; because both the *executiva* and the *ordinaria via* have been introduced in his favor, and though distinct, are not *contrary* to each other; and in using the one he does not abandon the other."

Febrero *citato* says, No. 133: "As to the question whether the *actor*, after having brought an ordinary action, may dismiss it and pass to the *via executiva*, the authors are divided for want of legal decision. Some say that he may, provided he pays the defendant's costs. But Carleval *de judic. tit. 3, disp. 14*, supposes two cases: the first, when the creditor who made his selection, having it in his power to use the *executiva*, abandons the *ordinaria*, and resorts to the *executiva*; in which case, Carleval, supported by upwards of thirty authors, and some texts of law which he quotes, says, that he cannot; and that the exception of *litis pendencia* will stop him, unless the debtor remains silent: because, in the first place having chosen the *via ordinaria*, when he could use the *executiva*, he is considered as having renounced this; and in the second place, it is not in his power to abandon the suit which he has commenced and is pending between him and his debtor, without his consent; because when there already is *litis contestatio*, it amounts to a *quasi contract*," &c. and I adhere to his opinion.

No. 115: "And if the creditor brings first the action *executiva*, and then passes to the *ordinaria*, he may discontinue this and go on with the first, on paying the costs occasioned to the defendant, by the proceedings on the *ordinaria*; and the reason is this: the two actions are distinct but not *contrary*. The *executiva* is introduced in his favor; by using the *ordinaria* he is not considered as having renounced the *executiva*, except when he does expressly say so, and no injury or prejudice results to the debtor, provided his costs are paid him."

I candidly confess that I cannot see in any of these quotations from the Curia Philippica and Febrero, how it would be permitted to decide as the court has done in the cases referred to by the plaintiffs: at the same time, I will

say, that if I had the honor of a seat on this bench, I would also compel the *actor* to make his selection, if an exception was taken by the debtor to his cumulating both remedies in the same petition, and my reasons are these: when the executory process issues, the debtor may have the *execution* suspended, by filing, within ten days, certain *exceptions*, such as that of payment, fraud, simulation, usury, &c.; and when any of these exceptions is filed, there is *litis contestatio*, and the law requires that the proceedings should, from that time, follow the course of an action *ordinaria*, until final judgment.

If, then, the creditor, without waiting for any exception of those just mentioned, and in the same petition in which he takes the *via executiva*, and obtains his order of seizure and sale, proceeds, also, in the ordinary way by citation, &c., I would at once, upon an exception filed by the debtor, to that effect, tell the creditor, you have yourself, by proceeding as you have done, turned from the *executiva* to the *ordinaria*; the *executiva* must, of course, be suspended until the *ordinaria* is completely gone through, and a judgment rendered: but, surely, unless there was an *exception* to that effect, I never would feel authorised to throw any obstacle in his way. This, the court seems to have taken good care not to do; for, I see that in both the cases quoted by the plaintiffs, *exceptions* were filed by the debtors.

Be it as it may, after all, those two decisions do not support the plaintiffs in their new position; for, certainly it cannot possibly be inferred from either the one or the other, that when a man cumulates in the same petition, the executive and the ordinary actions, his proceedings are null and void: and one solemn decision, at least, in the absence of law, (admitting that this court may in that case or in any other, make laws for our government, which, I believe, no body will presume to say it may,) would have been necessary to justify the plaintiffs in taking that bold ground which I hope the court will say is far from being at all tenable.

Let us add here one single remark: those who were in possession of the property, against whom the order of seizure

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and sale issued, and who were the only and real defendants who might therefore have, if they had thought it proper, taken any exception to that pretended irregular mode of proceedings, have not said a word; have made no objection at all.

Can the plaintiffs, who are strangers not only to those proceedings, but to the succession against which they were directed, can they I ask, come now and disturb what has been done by all the true parties to that executory action? I am persuaded the court will say with me, that they cannot.

But it has been objected "that Mrs. Poultnay was never cited." Admitted; and what of that?

If her husband had been alive there would have been no necessity to serve him with a citation. *Curia Philippica, juicio executivo verbo mandato, No. 7.*

In the second place, she was not in possession.

In the third place, she had renounced the community.

Finally, her children whose natural tutrix she was, had not been made heirs by any acceptance and were total strangers therefore to the *succession*, which I repeat, was a fictitious person representing the deceased in every respect, and whose interests were defended by syndics duly appointed to *administer for the interest of all concerned*.

For what purpose then should she have been cited?

She could have no defence to make either in her own name or in the name of her children.

Suppose that she or her children were interested, I say, that as the debt claimed was proven by a notarial act, by the *bilan* of the deceased, and by judgment of homologation, no kind of defence, plea or exception, on her or their part could exist; and I say, that in such a case no citation was necessary. Look at the *Curia Philippica, Febrero and Villadiego*, and you will find that though it is a universal principle of law, that citation is necessary for the validity of proceedings in court, and that the want of citation vitiates the whole, yet, in a case like that under consideration the citation may be dispensed with. *Curia Philippica, juicio*

*Civil, verbo citacion, No. 22; 3d Febrero, juicios 93, No. 149;* *Villadiego, pages 7, and 8.*

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Another objection on the part of the present plaintiffs is, that the sale ought not to have been made by the sheriff upon the order of seizure, that it ought to have been made by order of the syndics.

What of that again?

The syndics, who defended the fictitious person representing in every respect the deceased, who were in possession, who had been authorised to sell according to law, might possibly have said to the actors: "We do not deny your claim; we know it to be just; but we shall ourselves cause the property, which is specially mortgaged to you, to be sold as the law requires; and out of the proceeds we shall satisfy you." I have no doubt that this answer would have been held good by the court. But can it be said that, because those syndics who were the only proper defendants, would not or did not think proper to make such a defence, and instead of making it, consented, either tacitly or expressly that the property should be sold by the sheriff, on an order of the court, the sale made in that manner is null and void? Surely, the plaintiffs' counsel cannot insist upon such a pretension as this.

We come now to the last point, which, in my opinion, is entitled to some consideration, and which is the second of the printed points of the plaintiffs, to wit:

"The acceptance of the inheritance by the heirs has a retroactive effect," &c.

In support of this, we are referred to the Civil Code, 160, articles 72 and 73, which says:

"The acceptance of the inheritance, has a retroactive effect, that is to say, the heir is thereby considered as if he had taken possession of the estate at the time when the succession was opened by the death of the person to whom he succeeds, whatever be the time that elapsed between such death and the acceptance; from whence it follows, that the heir has a right to all the property which may have increased

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the estate during that time, and that he is likewise bound to support all the charges which may have accrued."

"The acceptance of the heir has also this effect, that he becomes of right and without any authorisation of justice, seized of all the goods, rights and actions of the deceased, under the obligation of satisfying all the charges of the succession."

May it please your honors, I am inclined to think, that had the plaintiffs' counsel reflected somewhat more seriously, before printing their twenty-three points, they would have spared themselves the trouble of inserting this among them. They would certainly have seen, that the two articles which they have had the candor to quote in support of it, could not in any manner be made to apply to their own case. 1st, They are found under the head of, and apply exclusively to, *the acceptance pure and simple*. 2d, The plaintiffs never accepted in that short but dangerous manner; they were cautious enough to accept in the safest of all ways, that is, under the benefit of inventory.

The first manner of acceptance renders the acceptor *liable* for all the debts of the deceased. So say the two provisions of the code above transcribed.

The second does not make the acceptor liable *ultra vires hæreditarius*.

In the first case, the heir takes *all* but pays the debts, whether that *all* is sufficient or not; and he pays them out of his own money and property, of course, when the estate thus by him taken, is insufficient.

In the second case, he takes the estate, to pay the debts out of its proceeds. When they are paid, if a balance remains, it is his; but when there is none, he is not even rewarded for his trouble; for no commission or remuneration is allowed him for his administration. *Civil Code, page 164, articles 96, 97. Ibid., page 170, article 116.*

In the first instance he is the true proprietor.

In the second, he is a mere administrator, without salary.

To conclude, I shall take the liberty of referring the court to Salgado, who speaking of the retroactive effect of the

acceptance, says, page 221, No. 42 : " *Ista fictio retroactiva non est in consideratione, quando vertitur prejudicium tertii, qui jus habebat quasitum antea quam fictio locum haberet.*"

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I believe, may it please the court, that I have succeeded in making good the defence which I had undertaken to make. I think I have succeeded in showing that the succession of John Poultnay, jr., had, prior to the suit brought against my client, been legally divested of the property in dispute ; that the court, by the process of which the said succession has been thus divested, had full jurisdiction ; that all the proceedings before it, have been regular ; and I am satisfied that you will say with me, that the plaintiffs have no kind of title to the property now in the possession of my client ; that judgment must, therefore, be rendered in his favor, against them.

As to the question of prescription, I shall say nothing. It was ably treated by my colleagues ; but, I beg leave to tell you candidly, that, upon a strict examination of the law, and of the facts to which it applies, prescription does not exist in favor of my client. It is not, therefore, upon this ground ; it is upon those that I have just discussed, and, I think, made irresistible, if not by my feeble arguments, at least by positive, clear law and authorities ; that I rely to hear it said, in consequence of your judgment: "The plaintiffs are gone."

*Grymes and Slidell*, for the plaintiffs, in reply.

This is not a vacant estate, as contended for by the counsel for the defendant. The heirs were present, known and represented ; and as the law *then* stood an estate was only declared to be vacant, the heirs of which were either unknown, or absent and unrepresented. *Civil Code*, page 172, article 120, 121. *Ibid.*, page 158, article 57. 4 *Toullier*, page 318, No. 294.

2. The property of Poultnay's estate vested in his children, who were his legitimate heirs from the moment of his decease, and by the mere operation of law. *Civil Code*, article 10, page 146. *Ibid.*, 60, 1, 2, 3, page 158. *Domat*,

EASTERN DIST. lib. 5, 298, 308. *Partidas* 6, title 6, law 13. *Heineccius June, 1855.* *Prelectionis*, 2 vol., page 70. 7 *Louisiana Reports*, 222.

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3. A vacant succession represents the heir and not the ancestor. *Merlin's Rep. verbo heredité*, No. 1, 23. 4 *Toullier*, pages 93, 95, Nos. 80, 83. *Vazeille traité des prescriptions*, vol. 1, Nos. 72, 73, page 77.

4. If a curator be appointed to a vacant estate, without citing the heir, or without using due diligence to find him out so that he may be informed of the proceedings, such appointment is null and void. *Salgado*, page 221 Nos. 19, 20, 23, 24.

5. In this case, prescription does not run against the heirs as is contended for. Uninterrupted possession *animo domini* under a title translative of property, is necessary to form the basis of the ten years' prescription and to acquire a complete title. *Civil Code, articles 38, 44, page 482. Vazeille, vol. 1, page 30, Nos. 32, 69. 10 Martin, 291.*

6. According to the statutes passed by the legislature and which were in force when this succession was opened, the property of an estate or of a vacant succession could only be sold by order of the judge of Probates, contradictorily with an attorney appointed to represent the absent heirs. See *Session acts of 1817, page 186.*

7. The respite granted to Poultny before his death, enured to the benefit of his heirs after his decease. 7 *Febrero part 2, lib. 3, chap. 3. No. 232.* All the obligations of the ancestor are presumed to be heritable under our laws. A person is deemed to have stipulated for himself, and his heirs and assigns, &c. *Civil Code, article 22, page 264.*

8. In order to have availed themselves of the respite, the creditors should have had the judgment of homologation declared executory against Poultny's heirs after his death; because property which has ceased to be his, cannot be affected by a judgment to which the new owners are not made parties. *Legendre vs. M'Donough, 6 Martin, N. S., 513-14.*

*Bullard, J.*, delivered the opinion of the court.

This cause, in connexion with others strongly analogous, involving a variety of difficult and embarrassing questions of law, on the solution of which, it is understood, depends a vast amount of property, has occupied for several weeks, the anxious and undivided attention of this court. Both parties come forward under circumstances of equity: on the part of the plaintiffs, they appeal to their tender age and legal incapacity, and invoke the protection of the laws as the guardian of their rights. The defendants, on the other hand, exhibit themselves as utter strangers to the original proceedings of which their adversaries complain, as possessors in good faith, by purchases fairly made for a valuable consideration, and long possession. They, in their turn, rely on the presumed sanctity of judicial proceedings, growing out of the alleged insolvency of the plaintiffs' ancestor, the renunciation by his widow, and the silence and acquiescence of all concerned, for a period of thirteen or fourteen years.

In this conflict of equitable considerations we are bound to examine the legal rights of the parties, according to the laws in force at the time these transactions took place, without regard to any change of laws or circumstances since that period, guided by the best lights within our reach; and in this investigation we have been greatly aided by the very able and elaborate arguments of counsel on both sides.

The succession of John Poultney, junior, whose title to the property in controversy is not contested, was opened in 1819, and this suit was instituted by his minor heirs in December, 1832, who afterwards, and pending the suit, accepted his succession, with the benefit of inventory. The defendant denies the title of the plaintiffs, and sets up title in himself, under a sale from Charles Harrod and Francis B. Ogden. The vendors of the defendant being called in warranty, answer by a general denial.

A leading question argued at the bar, and which first calls for our consideration, relates to the true legal situation of Poultney's estate as vacant or not, and whether, according to the law then in force, his heirs were vested with the title

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and property immediately on his death; or whether up to the time this suit was instituted, or the estate was formally accepted in 1833, they must be regarded only as having the faculty to acquire the property by acceptance, while the succession must, in the meantime, be considered as vacant, and not represented by an heir at law. It is conceded that the maxim of the customary law of France, that the title and possession of the heir, are but the continued and prolonged title and possession of the ancestor, according to that fiction, which represents the ancestor at the moment of his decease, as investing his heir with all his rights, *le mort saisis le viv*, was not known in its full extent to the Roman law, nor adopted in Spain. But, it is contended that the succession of children who, at the death of their father, were under the paternal power, and were denominated *sui hæredes*, formed an exception to the general rule; and that, as relates to them, no acceptance or judicial recognition, or *additio hæreditatis* was required to invest them with a perfect title to the property left by the father. That, while other classes of heirs, by the Roman law, were considered as having acquired a right in the property composing the estate, only by acceptance or some act equivalent thereto, these forced or necessary heirs, on the contrary, were regarded as continuing the existence of the *pater familias*, both in property and possession; and that a succession so represented could not be considered as vacant or *hæreditas jacens*.

This necessary heirship, which involved as a consequence the obligation on the part of the heirs to pay even *ultra vires hereditarias*, all the debts and charges of the estate, does not appear to have been adopted as a part of the law of Spain. That such heirs, without even entering on the estate, were capable of transmitting, at their death, the inheritance to their heirs, is undoubted; but the right of abstaining from the succession, of repudiating it, and consequently of being exonerated from the actions of creditors before acceptance, or intermeddling, and finally that of accepting with the benefit of inventory, appears to us repugnant to those subtilties of the ancient Roman law. 1 *Gomez variae Resolutiones, verbo Transmis, hæred. No. 25 et seq.*

The text of the 1st law, title 14 of the 6th *Partida*, which treats of the *entrega* does not recognise any distinction between ordinary heirs and those who were denominated *sui hæredes*. This *entrega* or delivery is defined by that law to be the corporal taking possession of the property composing the estate: “*apoderamiento corporal que recibe el heredero de los bienes de la herencia;*” and it is said to be attended with great advantage, for the heir gains thereby, at once, the mastery or ownership of the estate: “*ca, si de otra guisa fiziessen avria el nome sin la pro.*”

Whatever difference of opinion may exist among commentators, as to the true construction and effect of this law of the *Partidas*, it appears to us that the provisions of the Code of 1808, were too plain and explicit to admit of the distinction here contended for. According to that code, no one could be compelled to accept a succession and to assume the quality of heir: having accepted, he might still renounce; and having renounced, he might, in some cases, still accept again. It may, therefore, be said, that the heir could not be compelled to renounce within the period limited for his acceptance. Until such acceptance or renunciation, the inheritance is considered as a fictitious being, representing, in every respect, the deceased, who was owner of the estate. The acceptance has, it is true, a retroactive effect, and the heir is considered as having possessed from the opening of the succession; but it is by acceptance he is considered as seized of the property. Before acceptance, his title is *in facultate*, but not vested, at least as to third persons. *Civil Code*, page 161 *et seq.* The widow having renounced the community, and no body claiming the estate as heir, or under any other title, it must be considered as a vacant estate, according to the definition given in *article 118, page 172*, although the heir was present.

Such is the view taken of the provisions of the Code, by this court, twenty years ago, in the case of *Cresse vs. Marigny*. “The principle is,” says the court, “that, until acceptance or renunciation, the inheritance is considered as a fictitious being, representing, in every respect, the deceased.”

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According to the *Civil Code* of 1808, no one could be compelled to accept a succession and assume the quality of heir; and having accepted, might renounce, and even accept again in some instances. Until such acceptance and renunciation, the inheritance was a fictitious being, representing, in every respect, the deceased. Before acceptance, the title of the heir is not vested. So, where the widow renounced the community and no person claimed as heir for thirteen years, the estate was considered and held to be vacant. *Civil Code* of 1808, art. 118, p. 172.

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In the meantime there is no heir, and we see no reason why the persons who have a right to refuse to be heirs, should be considered as such, before they make known their intentions."

4 Martin, 57.

If the mother and natural tutrix of the minor heirs of Poultnay, had, with the advice of a family meeting, accepted the succession for them, soon after the death of their father, they would have been regarded, in relation to creditors, rather as administrators than as the true heirs and proprietors of the estate ; they might have been required to give security for the administration : they would have been entitled, in their own right, as heirs only to the *residuum* after the payment of the debts and charges of the succession. *Civil Code, page 168, article 104, et seq.*

When, as in the case now before us, the acceptance takes place many years after the opening of the succession, after the property has been alienated by judicial authority, at the instance of creditors, and for the payment of debts which formed a charge on the estate, and upon the heirs, the retroactive operation of such an acceptance ought not to

The rules and forms prescribed for the alienation of minors' property, as such, viz : that it can only be sold in pursuance of the advice of a family meeting, and for its *appraised value*, do not apply to property alienated by judicial authority, at the instance of creditors and for the payment of debts which formed a charge on the estate ; because the sale of property in which minors were interested, for the payment of debts, has always formed an exception to the rule.

Upon this subject, we think the following propositions may be laid down as fair and logical deductions from the principles of law, according to which the validity of the defendants' title ought to be tested.

1. That the rules which apply to the alienation of minors' property, as such, to wit : that it should be sold in pursuance of the advice of a family meeting, and not for less than its appraised value, have no application to this case ; because,

the sale of property in which minors are interested, for the payment of debts, has always formed an exception to the rule; and, because the minor heirs, at best, have but a residuary interest in the estate, which could be ascertained only by a full administration.

2. That all those grounds of nullity in the proceedings, which assume and are founded upon the hypothesis, that the minor heirs were always, from the opening of the succession, and before acceptance, his representatives in relation to creditors, and as such, entitled to citations and notices, must be laid out of view as inapplicable. These minor heirs, without acceptance, must be considered (saving the right to accept at a future time) as strangers to the succession, and the succession itself as vacant, and not represented by an heir.

These principles may be said to be of a negative character, and to warn us what ought not to be our guide, rather than as furnishing the true legal test and standard, by which we are bound to estimate the pretensions of the parties to this controversy. Both parties have appealed to article 95, page 164, of the Code, and much reliance has been placed on the principles which it consecrates. It declares, that "so long as prescription of the right of accepting is not acquired against the heirs, who have renounced, they have the faculty still to accept the inheritance, if it has not been accepted by other heirs, save, however, the rights which may have been acquired by third persons, upon the property of the succession, either by prescription, or by lawful acts done with the administrator or curator of the vacant estate."

This article applies by its terms, to a case somewhat different from the one now before the court. It supposes a renunciation by the heir, and a subsequent acceptance by the same heir. Now, a renunciation is not presumed, and in a legal sense of the word, the plaintiffs cannot be said to have renounced the estate of their father. Their tutrix might, with the advice of a family meeting, have accepted, but then it could only have been with the benefit of inventory. The estate was rather left vacant than renounced, their tutrix having neglected to take any steps to preserve the

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Minor heirs, without acceptance, must be considered as strangers to the succession, which is in itself vacant, and not represented by an heir; consequently, the heirs are not entitled to citations and notices in the proceedings by the creditors to sell and distribute the property in payment of the debts.

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rights of her children. - Let us suppose she had accepted, and finding it afterwards for the advantage of her children to abandon the estate, what steps would she have been compelled to take by the law then in force? The 7th law of title 19, of the 6th Partida, provides for such a case. It declares, that "when a minor has been admitted as heir, if he considers it disadvantageous to retain the estate, he may pray the judge to authorise him to abandon it, although he may have entered upon it. But when this is to be done, it should be contradictorily with the creditors, that they may know for what cause he abandons; and the judge, if he considers it disadvantageous to the minors to retain the estate, may authorise him to abandon, and replace him in his former condition, first placing all the effects which belong to the estate in custody, (*recabdo.*)" We here see, that while the law is indulgent to minors, it is provident of the rights of creditors, and that they are entitled to notice, whenever the heir who has accepted, wishes to renounce,

After the time for deliberation has elapsed, an alienation made fairly by competent judicial authority, and for the payment of debts due by the deceased, and more especially mortgaged debts on the property alienated, will conclude the heirs who accept afterwards, with the benefit of inventory.

It is a settled principle that the retroactive effect of an acceptance, which is in truth but a fiction, should not be so extended as to operate to the prejudice of the rights of third persons, previously acquired.

We have high authority for assuming as a principle, that the retroactive effect of an acceptance, which is in truth but a fiction, should not be so extended, as to operate to the prejudice of the rights of third persons, previously acquired.

1 *Salgado, part 1, chapter 32, Nos. 40, 41, 42.*

If the plaintiffs, on their acceptance of the estate, instead of a petitory action, had instituted their action for restitution *in integrum*, their success would have depended on the proof of two facts: minority and lesion. In considering whether they had suffered lesion, regard must have been had exclusively to the state and condition of things, at the time the transactions complained of took place, without any reference to subsequent changes, wholly independent of the will, or acts of either party. It is, to say the least of it, extremely questionable whether the plaintiffs, by adopting a different form of action, can change the measure of their own rights, or those of their adversary.

With these general principles in view, we proceed to examine the condition of the succession of Poultney, at the time of his death, in relation to creditors, and the rights of creditors in relation to the property, and to the heirs at law.

We cannot doubt, from the evidence in the record, that John Poultney died insolvent, not only in a legal sense, but in the common acceptation of the word. A few months before his death, he had applied to the District Court, to call his creditors together, alleging his inability to meet his engagements, and had obtained a respite for one, two and three years, which was homologated by the court. He died before the first payment fell due, according to the terms of the respite. The respite was asked for and granted, on the express ground of his inability to pay his debts, and the suit brought by him against his creditors a species of *concurso*, for the purpose of obtaining a forced respite, constituted him a *falido* or insolvent, according to the doctrine of the *Curia Philippica, verbo falidos, Nos. 1, 3.*

After the respite was granted and sanctioned by the court, the debtor might have been compelled to pay at the terms fixed by the respite, and was no longer at liberty to make a voluntary surrender or *cessio bonorum*, and was without any other remedy: he might be compelled to give security, if it was proved that he concealed or dissipated his property, in fraud of his creditors. *Villadiego 53, No. 166, 167.*

Whether the same court, which homologated the agreement of a majority of the creditors, and had ordered a stay

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of proceedings, was competent to enforce the agreement, by compelling the debtor to pay, without the necessity of instituting a new suit, we do not think it necessary to decide; but it appears clear to us, that neither the debtor nor his representatives could afterwards contest the validity or amount of the debts set forth and admitted in his petition; and that as to both, the judgment of the court homologating the agreement, would have the force of the thing adjudged.

But the debtor in this case died before the first payment fell due, according to the terms of the respite; and the question has been much discussed, whether the legal representatives of Poultney could avail themselves of the delay granted by the creditors and sanctioned by judicial authority or whether the privilege was merely personal, and ceased on the death of the debtor. *Febrero* seems to distinguish between heirs pure and simple, and those who accept with the benefit of inventory. His words are, “*no aprovecha la moratoria á los herederos del deudor que estando pendiente fallecio, si aceptan su herencia con beneficio de inventario, aunque el juez la haya aprobado; y la razon es, porque como por esta aceptacion es visto no querer obligarse ultra vires hereditarias no hay materia sobre que recayga, y asi pueden los acreedores proceder contra la herencia sin aguardar á que expire el término concedido.*”

It is contended by the counsel for the appellants, that the *moratoria* here spoken of, is the respite granted by the sovereign or his council, and not that which is more properly called the *espera*, founded on the consent of creditors in a *concurso*. To this objection it may be answered: *first*, that the two words *moratoria* and *espera* are used both in the texts of the Spanish law, and by the best commentators, as synonymous; differing only in their etymology and employed indiscriminately by *Febrero* himself. *Second*, that he speaks of the respite as not availing the beneficiary heir, although it had been approved by the judge, and therefore not intending to confine the principle to that kind of respite which flows from the royal prerogative, and which required no judicial sanction, but was, in fact, a mandate addressed

to the tribunals, commanding them not to molest the debtor for a specified period; and again, that the same author had previously said that the *moratoria* granted by the prince, is a mere personal privilege, and did not extend either to the sureties or successors of the debtor: but the reason given by the author renders it clear to our minds that he meant such a respite as the one granted to Poultney, by his creditors. The reason assigned is, in substance, that the heir who accepts with the benefit of inventory, does not accede to the obligation of his ancestor to pay the debts, but he engages to pay so far as the means of the estate may extend. The condition upon which the respite was granted, to wit: that the debts should be paid at the stipulated periods, under pain of compulsory process, no longer exists, as between the creditors and the beneficiary heirs; and, therefore, the contract, if it be so considered, is no longer binding: but the authority of *Salgado* is explicit on this point. 1 *Salgado*, part. 2, cap. 30, No. 71..

We are, therefore, of opinion that the estate was insolvent; the debts all due and demandable, notwithstanding the respite; and that the succession was not represented by an heir; and the question now arises, what remedy was left to the creditors; what proceedings did the law authorise them to take, and before what tribunal could they proceed?

The widow, shortly after the death of Poultney, caused the seals to be affixed on the effects of the estate, proceeded under the authority of the Court of Probates to have an inventory taken; and, finally, on the 25th of January, 1820, by a formal declaration before a notary public, renounced the community of acquests and gains. In this state of things, on the 10th of February, 1820, some of the creditors, who were parties to the respite, applied by petition to the same court, that of the First Judicial District, representing the insolvency of the succession, the renunciation of the widow, and that the estate was unrepresented, and prayed a meeting of the creditors for the purpose of taking into consideration the affairs of the succession, and of naming syndics to administer the same for the benefit of all concerned. A

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Where a respite has been granted to a debtor by his creditors, and he dies before the first instalment becomes due, according to the terms of the respite, his estate will be considered insolvent, and the debts all due and demandable, notwithstanding the respite, if the estate is accepted with the benefit of inventory.

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meeting of the creditors was thereon ordered. The creditors met and appointed syndics, whose appointment was confirmed by the court, and they were authorised to take possession of the estate, and to sell the property. The petition presented by the syndics for that purpose, represents that they had been appointed, and that more than ten days had elapsed since the filing of the proceedings, and no opposition had been made. This order of the court bears date April 4, 1820.

On the 23d of March preceding, the same syndics presented their petition to the judge of the Court of Probates, in which they set forth that the widow Poultnay having renounced the community, a meeting of the creditors of the deceased had been had, under the authority of the District Court, and that they had been appointed syndics ; they therefore pray that the seals of the Probate Court may be taken from the papers, effects, &c., of the deceased, and the same delivered to them to be administered according to law ; wherefore the court gave the following order : "Let A. Peychaud, Esq., justice of the Peace, be authorised to take off the seals affixed upon the papers and effects left by said deceased, as prayed for."

Did the syndics thus appointed legally represent the vacant succession of John Poultnay ; and if so, were the proceedings had contradictorily with them, which terminated in the alienation of the property in controversy, binding on the heirs, who subsequently accepted his succession, according to a just construction of that article of the Code, above commented on, which recognises the validity of acts done within the administrator or curator of the vacant estate ?

The counsel for the appellants in their 4th point, contend that no forced surrender could be had of the estate of a deceased person, on the suggestion of its insolvency. It could only be administered by the Court of Probates. The first case relied on, that of Dupuy vs. Griffin, differs essentially from this. In that case the estate had been in a train of administration, by a testamentary executor acting under the authority of the Court of Probates, and this court decided, that the creditors could not compel the surrender of it to be

administered by syndics. In the case of *Jenkins vs. Tyler*, the only question was, whether an order of seizure issued against mortgaged property, could be prosecuted after the death of the defendant, who died after the seizure. But the question now presented is, not whether by the law existing at that time, the representatives of an insolvent estate could be compelled to surrender it into other hands, to be administered for the benefit of creditors, but whether syndics or other representatives could be validly appointed to represent the succession of Poultnay, *not otherwise represented*, at the instance of creditors, with a view to the administration of the property, for the benefit of all concerned in *concurso*, and if so, whether such appointment by the creditors, sanctioned by the District Court, constituted them legal administrators of the succession.

That an estate not represented by an heir, might by the Spanish law, be provided with an administrator or curator, at the instance of creditors, with a view of administering it in *concurso*, appears to us well established by authority. *Salgado* on this point, says: “*Hæreditati, ære alieno gravata nondum aditæ sed jacenti, instantibus cretitoribus pro solutione, dandum esse curatorem cum quo judicium concursus agi possit legitime inter hæreditatem et creditores, abunde diximus,*” part 1, chapter 32-1.

The same author considers it quite immaterial, whether the person so appointed, be denominated curator, administrator or syndic, and he recognises the right of creditors, to indicate the proper person to be appointed.

This species of *concurso* or *ocurencia de acreedores*, is treated of by *Febrero*, in the passage cited by the counsel for the defendant, as a proceeding which often takes place without the concurrence of the debtor himself, as when his creditors on the death of the debtor, present their claims in the tribunal, charged with his *testamentaria*, or when they unite in proceeding against the property of the debtor, on his flight or failure. Among the points of difference between this and other kinds of *concurso*, that author gives the following: “*que en este no hay memoriales de bienes, ni acreedores, ni á instancia*

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According to the Spanish law, an estate not represented by an heir, might be provided with an administrator or curator, at the instance of creditors, with a view to administer it in *concurso*, for the benefit of all concerned.

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*del deudor se convocan, ni citan, ni se fijan edictos, ni tampoco se nombra regularmente defensor y on el otro, si; bien que cuando se forma por muerte, fuga ó quiebra y se ignora que acreedores tiene, se debe nombrar de oficio, y llamarlos por edicto, y así se practica on esta corte."*

These authorities appear to us to sanction a proceeding on the part of the creditors *in rem*, against the estate of a debtor not otherwise represented, for the purpose of procuring the payment of their claims in the nature of a *concurso necesario*, and the appointment of a *defensor* by the tribunal in which it is instituted. But, it is contended that even admitting the right to institute such proceedings, yet in this case they are void, first, because no citation or notice was previously given to the heirs; and, secondly, because the District Court had no jurisdiction, but the Probate Court alone could have taken cognizance of such a case.

It is only necessary to seek out and cite the heirs, in a proceeding to administer an estate *in concuro*, to ascertain if one has been instituted by testament, he must be specially cited by name. The widow, who was present in the place, and who alone could have exercised the actions of her minor children, and by an acceptance put an end to the administration by syndics or curators, was well informed of these proceedings. She joined in executing certain powers of attorney with the syndics, relating to the interests of the estate. The only purpose for which it was required to seek out an heir, was to ascertain whether such an heir would accept or renounce the succession. The widow had taken time to deliberate, had procured an inventory to be made, and finally renounced for herself before these proceedings begun on the part of the creditors.

I. In support of the first ground of nullity, the appellants rely on the authority of *Salgado, part 1, chapter 32, number 23, et seq.* He says, an heir ought to be first sought after *haeres perquerendus erit*; and he adds, that if it is certain to ascertain if one has been instituted by testament, he must be specially cited by name. The widow, who was present in the place, and who alone could have exercised the actions of her minor children, and by an acceptance put an end to the administration by syndics or curators, was well informed of these proceedings. She joined in executing certain powers of attorney with the syndics, relating to the interests of the estate. The only purpose for which it was required to seek out an heir, was to ascertain whether such an heir would accept or renounce the succession. The widow had taken time to deliberate, had procured an inventory to be made, and finally renounced for herself before these proceedings begun on the part of the creditors.

The rights of minors, situated as these were, are fully exercised by their tutors. *Civil Code 172, article 120.* It cannot be pretended that the children personally were entitled to notice; and in our opinion, the only legitimate consequence which would follow from a neglect to call on

the tutrix in a more formal manner, to accept or renounce, when she herself acquiesced, with a full knowledge of the proceedings, and neglected to interfere, would be to authorise a restitution *in integrum* on the part of the minors, so far as they could show themselves injured by the proceedings.

II. The second ground of nullity urged, to wit: the want of power in the District Court to make such an appointment, and to entertain jurisdiction in relation to the administration of such a succession, has been pressed upon us with great force of argument, and the question is not free from difficulties. It is said that, even admitting the jurisdiction of the District Court, *ratione materiæ* of a suit for debt against an estate or its legal representative, yet the power to appoint such representative, under the denomination of administrator or curator, always pertained exclusively to the Court of Probates.

Although the estate of Poultney is considered as having been vacant, because its possession was not claimed by an heir or under any other title according to the definition given by the Code of 1808, yet it does not appear very clear that it was of that class of vacant estates, to which the Court of Probates had the exclusive authority to appoint a curator. Article 120, page 172, declares, that "such administration shall not take place if all the heirs are present or represented in the territory, though all or some of the heirs should be minors; the rights of such minors being fully exercised by their tutors or curators." The creditors, at the same time, have rights to exercise; in this particular case, a mortgage with the privilege of vendor, *jus in re*. They had a right to pursue the property wherever it might be found, into whose soever hands it might come. This was a case not expressly provided for by the Code, and the creditors applied to the District Court for redress, a court of general jurisdiction and with ample powers to afford relief. Under its authority, syndics were appointed as defensors, against whom the creditors proceeded to exercise their hypothecary actions. The authority to make such appointments as are incident to its jurisdiction of the cause, is recognised by Spanish commen-

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Under the Civil Code of 1808, the District Court had jurisdiction *ratione materiæ* of proceedings against a vacant estate, administered for the benefit of creditors, and could legally appoint administrators, curators or syndics to administer and dispose of the property of such estate, for the benefit of all interested therein.

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tators. That the District Court was not without jurisdiction *ratione materiae*, of a suit against an estate, and that judgments rendered in such cases are not radically null, is fully settled in the case of *Tabor vs. Johnson*. The undisputed exercise of such jurisdiction for a long series of years, the general acquiescence of the legal profession, the universal understanding among the people, as well as the courts and the bar, form together such contemporaneous interpretation of the laws relating to conflicting jurisdictions, that however doubtful it may appear on a close analysis, it cannot now be disturbed without the greatest injustice, and inflicting incalculable mischiefs on the country.

We come now, to inquire into the proceedings had by Harrod & Ogden, against the syndics, in pursuance of which, the land in controversy in this case, was sold to satisfy a mortgage, with the privilege of vendor, and which was due to them under a subrogation from Madame Rousseau. If that alienation was valid, it is not necessary to inquire into the proceedings subsequently prosecuted in the Probate Court; because this being a petitory action, the plaintiffs cannot recover without showing title in themselves, and if the estate had been previously divested of title, the heirs are precluded by such alienation. It seems to be supposed, that the court has established a contrary doctrine in the case of *Bedford vs. Urquhart et al.*, recently decided, but on examination of the opinion of the court in that case, it will be found, that such a question did not arise, but that on the contrary, the court adhered to the principle laid down in the

In a petitory action, persons (as heirs) claiming the estate, are bound to make good their title against the legal possessor, and in opposition, the latter has a right to set up and prove by legal means, any title which may defeat the claim of the plaintiffs." In the case now before us, the defendant exhibits title under a conveyance from C. Harrod and F. B. Ogden, and in support of his right to be maintained in possession, is authorised to show, that the estate of Poultnay was divested of title by the proceedings in the District Court. To this it is objected, that the repre-

sentatives of G. M. Ogden, the first purchaser, repudiated that title, and proceeded to divest the heirs by a new suit, thereby admitting the title of the heirs existing, at the time proceedings were commenced in the Probate Court. But we are of opinion, that those proceedings were instituted to strengthen the original title, acquired under the first alienation, and that the declaration of the representatives of Harrod & Ogden, that those proceedings were null, cannot avail the plaintiffs, who were not parties, and that the principal object was to cancel certain mortgages retained by the sheriff, and that the sheriff was not a competent party for any other purpose. The allegation in that petition, that the first purchase by G. M. Ogden, was a nullity, is not such a judicial avowal as will avail the present plaintiffs; and if they rely on it as an avowal, they must take it all together; as well that part which asserts a title subsequently derived under the judgment against the widow and heirs in the Probate Court, as that which suggests the nullity of the first sale. 10 *Toullier*, 393, *et seq.*

The evidence offered by the defendants, to show that the estate was divested of title, consists of the sheriff's deed to G. M. Ogden, the order of seizure and sale, in virtue of which the sale was made, the sheriff's return, and a copy of the judgment ordering the seizure, and all the proceedings had contradictorily with the syndics. The sale took place on the 13th of June, 1820, and the writ or order of seizure is dated May 9th. The sheriff's return shows, that he made demand of one of the syndics, and that more than thirty days elapsed before the sale. This court has constantly recognised the principle, that the sheriff's deed and return upon the execution and judgment, furnish *prima facie* evidence of a valid alienation, and that he who attacks such alienation, must show that the forms of law were not complied with. 6 *Louisiana Reports*, 627. The presumption is, *omnia rité recteque gesta*.

But it is contended, that Ogden, being one of the mortgagees, was incapable by law, of purchasing the property mortgaged. The text of the Partida referred to,

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The first purchaser cannot repudiate the title by which he has sold to his vendee; and the averment in a petition, by him, that the proceedings were null under which the title was first acquired, cannot avail third persons who were not parties to them.

The sheriff's deed and return upon the execution and judgment, furnish *prima facie* evidence of a valid alienation; and he who attacks it must show that the forms of law were not complied with.

Mortgagees are not prohibited from bidding for and purchasing the mortgaged premises when sold under execution.

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confines the prohibition to the pledgee, without the consent of the owner of the thing pledged. But under the laws regulating sales under execution to the highest bidder, mortgagees are not declared incapable of buying, and the universal practice, we believe, has been the other way.

It is further objected, that the sale was not advertised according to law. The order of seizure issued on the 9th May, and the sale was made on the 13th June. There was,

Syndics may consent to the terms of sale of mortgaged property, that it be sold on a credit, and without appraisal; and such consent is binding on the heirs who afterwards claim the property, unless they show they were injured by it.

The several points made by the counsel for the appellants, which relate to the alleged irregularity and nullity of the proceedings that preceded the sale, particularly the 6th

7th, 8th and 9th, go to affect the validity of the judgment and order of the District Court, by virtue of which the sale took place. If the sale itself was regular, we are of opinion, that even the reversal of the judgment would not destroy its effect. This court has repeatedly recognised that doctrine, in relation to sales under execution, and maintained the rights of purchasers under sheriff's sales, although the judgment had been reversed for want of jurisdiction in the court by which it was rendered. *5 Martin, N. S. 214.*

In relation to the 22d point made by the counsel for the appellants, that the rights of the minors cannot be prejudiced by the neglect or omissions of their tutrix, and that any deviation from the forms prescribed by law, for the alienation of their property is fatal, and the sale a nullity, the court has already expressed its opinion, that the rules which apply to the sale of minors' property as such, when the title is fully

vested in them, are not strictly applicable to a case like the present, where the rights of the minors were contingent and residuary, subject to the undoubted claims of creditors, *deductio are alieno*, and who, in this very case, appear only as beneficiary heirs, claiming property already alienated for the payment of debts, which, if their tutrix had accepted in 1820, would have been due by them, and the property now sued for, would have been a pledge in their hands, for their payment. The proposition, therefore, that the rights of minors cannot be prejudiced by the negligence and omissions of their tutors, must be received with great limitations. So far as minors are prejudiced by the negligence or omissions of their tutors, they are entitled to restitution; but it does not follow, that the acquired rights of third persons, resting on the faith of judicial proceedings, are to be sacrificed, not for the purpose of replacing the plaintiffs in the position they would have occupied, if their tutrix had assumed the administration of an estate, so overwhelmed with debt that she renounced her own eventual interest in it as widow, but to give them possession of the property, when it is manifestly impossible, at the same time, to restore the creditors, whose rights are not less sacred to their original condition in relation to the estate. Coming forward with such pretensions, it is evident they seek something more than restitution: *certant de lucro captando*. But a review of the cases cited by their counsel in support of this principle, will show that this court has never pushed the doctrine to that extreme. In Chesnaux's heirs *vs.* Sadler, the question was, whether the alienation of immoveables belonging to a minor, made by the tutor, without any judicial authorisation, was binding on the pupil, and the decision was against the sale; but even in that case, the court seems to recognise the principle, that if the alienation were *prima facie* good, the minor would be driven to his action of restitution *in integrum*. In Gayoso *vs.* Garcia, it was decided that an executor who was authorised to sell, without the intervention of justice, was not dispensed from the obligation imposed by law, of selling at public

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auction, and that a private sale was void, as to the testamentary heirs, who were minors. The case of Elliott *vs.* Labarre, presents the single question, whether the sale of the property of a succession belonging to absent heirs, by the register of wills, without an order of the judge of probates, was binding on the heirs, and it was decided in the negative. In Donaldson *vs.* Dorsey's syndics, nothing more was decided than that a sale made under a judgment, to which neither the plaintiffs nor their mother were parties, did not divest them of the title. The principle settled in the case of Fletcher *vs.* Cavelier, is too self-evident to require comment, to wit: that the sale of minors' property by private contract, is void.

We have thus far considered the principles of law and equity involved in this case, without regard to the verdict of the jury to whom it was submitted in the court below, and whose finding was in favor of the defendants. It only remains to notice the bill of exceptions taken by the defendants to the charge of the judge.

After a deliberate examination of that charge, we find that on the leading principles of the case, it does not vary materially from the views which we have expressed. In some particulars, perhaps, the judge may not have laid down the law with sufficient limitations, and in the hurry and confusion of a jury trial, a great degree of precision is not to be expected, particularly in a case so novel in its character, and so complex in its details. In the main, the cause was fairly laid before the jury, and the facts left entirely to them, with instructions on the points of law of which the plaintiffs have no just cause to complain. Although the opinion of this court might differ essentially from that of the court below, on some of the various questions of law involved; yet, as the verdict has, in our opinion, done justice between the parties, we do not feel authorised to disturb it.

In conclusion, we cannot forbear to add, that it appears to us, the proceedings which led to the alienation of the property in controversy, growing out of the extreme disorder of

Poultney's affairs, were carried on in good faith, conducted on all sides by the most distinguished and experienced jurists of that day, before a court whose jurisdiction was not then questioned, acquiesced in by the tutrix of the plaintiffs, who had a right to exercise all their actions, and who considered it most prudent not to hazard her own, in the wreck of her husband's fortune. The property was sold to reimburse his endorsers the sums paid by them for the purchase of the property itself. The success of the plaintiffs in this case, would involve the same parties or their heirs in aggravated ruin, as warrantors of the property to the present possessors. If we consider the situation of things at that time, we are far from being satisfied that the condition of the minors would have been bettered by accepting the succession of their father. Fifteen years have, indeed, produced great changes; a plantation has risen into a city; but time, while it enhances the value of property, does not affect the immutable principles of justice.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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So far as minors are prejudiced by the negligence or omissions of their tutors, and in the sale of their property as such, the title being fully vested in them, when it is made without all the formalities of law being complied with, they are entitled to restitution. See decision in preceding case. *Ante* 425

But, as regards the ordinary disposition and sale of the property of an estate, in which the rights of minors are contingent and residuary, and which is subject to the claims of creditors, the acquired rights of third persons, resting on the faith of judicial proceedings, will not be disturbed; as the rules and forms for selling minors' property do not apply. *Ibid.*

This is an action of revendication, in which the heirs of the late John Poultney seek to recover two lots of ground, sixty feet front, each, on Magazine-street, between Poydras and Girod streets; and one hundred and twenty-six feet, each, in depth; which, they allege, made part of their deceased father's succession, at his death, and is now in the possession, and claimed by the defendant, Edward Ogden.

The defendant pleaded a general denial; and that he possesses the property, under an agreement with Wilkins & Linton, by which he leased it for two years from the 1st January, 1830, with the privilege of purchasing it on certain terms. He cites his lessors and vendors in warranty.

Wilkins & Linton averred they purchased the lots in question from N. & J. Dick, and Sarah Todd, as heirs of the late John Dick deceased, whom they call in warranty.

N. & J. Dick and Sarah Todd, aver their ancestor, John Dick, purchased from Oliver M. Spencer, who purchased the disputed premises at sheriff's sale, on the 26th May, 1821, which sale was made in virtue of two orders of seizure and sale emanating from the District Court, in the cases of

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The plaintiffs' right to the property, depends on the same facts and principles as are reported in the case of Poultney's heirs *vs.* Cecil's executor: *ante* 321.

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The cause was submitted to a jury, who returned a verdict for the defendant. From the judgment rendered thereon, the plaintiffs appealed.

*Grymes and J. Slidell*, for the plaintiffs, relied on the points and authorities made by them in the preceding case of the same plaintiffs against Cecil's executor.

*Conrad*, for the defendant.

The title under which this defendant holds, rests exclusively on the sale made under the proceedings in the District Court.

1. It is contended that that court had not jurisdiction of the case. The District Court being one of general jurisdiction, having cognizance of all cases, except where the law has expressly denied it, or what is the same thing, given exclusive jurisdiction to some other tribunal, the presumption is in favor of its jurisdiction, and the *onus probandi* rests upon the party who contests it. The counsel for plaintiffs have attempted to do so, but have not referred to any law conferring jurisdiction, *at all*, much less *exclusive* jurisdiction, on the Court of Probates, of cases like the present. The Civil Code of 1808 is silent on the subject. The words Court of Probates, do not once occur in it. The term Parish Court, alone is used, and it no more means Court of Probates, than it means District Court. The only decision rendered by this court, prior to the law of 1820, was that of *Abat et al. vs. Songy's estate*, 7 *Martin*, 274, which expressly denies the jurisdiction of the Court of Probates. There can be no doubt that this decision, rendered only a few months previous to the proceedings in Poultney's succession, must have been known by the eminent counsel by whom they were conducted and that their course was regulated by it. Next came the law of 1820, enlarging and defining the jurisdiction of the

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Court of Probates. There is no doubt that law conferred jurisdiction in cases like the present; but the fact of the legislature passing that law, conferring the jurisdiction, creates a strong presumption, that in their opinion, it did not already possess it. Even that law contains no exclusive language. It says the Court of Probates *shall have* jurisdiction, but does not say that the District Court *shall not* have it. All the decisions quoted by the plaintiffs, were rendered subsequently to the passage of that law; but as Poultny's succession was opened before its adoption, it is evident that as it contains no provisions requiring that estates already opened should be transferred to the Court of Probates, if the District Court had jurisdiction prior to the law of 1820, that law did not divest it. There is one observation, too, which may be applied to all the cases quoted by the plaintiffs. They were all cases where successions were regularly opened in the Court of Probates, and representatives to them had been appointed and confirmed under its authority, and are all based on arguments of the expediency of having all claims against the succession settled before the same tribunal from which the person, by whom it was administered, derived his authority, and of having the relative rights of creditors established in a *concurso*. See the remarks of the court in *Vignaud vs. Tournacourt's Curator*, 12 *Martin*, page 233, and in *Tabor vs. Johnson*, 3 *Ibid., N. S.*, page 679. These are the two leading cases on this subject. Now, in the present case *no representative of the succession had been appointed or recognised by the Court of Probates, and the claims of the creditors were settled and classified before one tribunal*. It may be very important that the claims against a succession should be ascertained by one tribunal, and that that tribunal should be the one by which the person who administers it was appointed, and to which he is amenable; but is it material by what name that tribunal is called, or whether it sit below or above stairs? When there is a positive, unequivocal declaration of legislative will, that will must be obeyed, even where it leads to consequences absurd or iniquitous; but a court will be cautious how they

apply their own decisions, founded on considerations of public convenience, to cases where those motives do not exist.

2. Even if the District Court had not jurisdiction, this court has repeatedly decided that its decrees in such cases were not void, but only voidable, and conferred title to purchasers of property sold under them. *Tabor vs. Johnson*, 3 *Martin, N. S.*, 674. *Foucher vs. Carraby et al.*, 6 *Martin, N. S.*, 550. *Donaldson et al. vs. Dorsey's syndic*, 7 *Martin, N. S.*, 377. *Dangerfield's executrix vs. Thornton's heirs*, 8 *Martin, N. S.*, 241, and 5 *Louisiana Reports*, 355. It is certainly a wise and salutary principle, that whatever has been done under the decree of a court should remain valid, although that decree itself should afterwards be set aside. The law has, in some instances, expressly recognised this principle. See *Louisiana Code, article 1113*; *Baillio vs. Wilson*, 5 *Martin, N. S.*, 214; *Sterling's executors vs. Gros*, 5 *Louisiana Reports*, 105. In the latter case the court intimate an opinion that sales made by an executor under a will which has been admitted to probate, will confer title, although the will itself should subsequently be set aside.

3. But it is contended that the proceedings are void, for want of citation on the *heirs*. To this the answer is obvious. The children of the deceased had not accepted his succession although the time for deliberation had expired: and, consequently, were not his heirs. *Old Civil Code, articles 73, 74, page 162*. *Curia Philippica, page 171, No. 1, Heineccius Recitationes, vol. 2. No. —, Cresse vs. Marigny*, 4 *Martin's Reports, page 57*; *O'Donald vs. Lobdell*, 2 *Louisiana Reports, 300*. If acceptance was necessary to vest in the heirs a right to the succession, until such acceptance they were not heirs: besides, citation to a party is only necessary where there is a contest *a lis mota*, and some judgment is sought to be obtained against him; but when no judgment can, or is sought to be obtained against a party, but only a conservative measure, relative to a matter in which he is remotely or indirectly interested, there is no need of citation to him. The article 1034 and others, provide for the appointment of administrators; and the law of 1826, *Martin's*

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*Digest, vol. 2; page 438, sec. 7,* for that of syndics *eo nomine*, by the creditors of a succession, even when the heirs have accepted with the benefit of inventory, yet, neither of them speak of citation to the heirs as at all necessary, and it has never occurred to any one that such a formality was necessary.

4. It is a confusion of ideas and terms to apply to these proceedings the term "forced surrender." To constitute a surrender there must be some one by whom it is made, either the original debtor, his heir or executor. Here there was neither. It was nothing else than the appointment by the judge of certain individuals, to administer the estate in the absence of any legal representative. Granting that the appointment might have been made by the sole authority of the judge, without the concurrence of the creditors, it does not follow, that, because that concurrence was not necessary, it must not vitiate the appointment which would otherwise have been valid. The authors speak of an estate surrendered by an insolvent debtor, and the *hereditas jacens*, or succession not accepted by the heirs, as different branches of the same subjects, and to be governed by the same principles. *Febrero, part 2, lib. 3, cap. 3, sec. 2, No. 39.* *Salgado part 1, cap. 13, Nos. 2 and 3, pages 94, 95.* The latter author says, (*Ibid., No. 10.*) that persons appointed to estates of insolvent debtors, or to vacant successions, are called indifferently, curators, syndics, defenders, &c., and that, in making the appointment, the judge should be governed in his choice by the wishes of the creditors: "*Præ oculis habere debet judex et sequi voluntatem et consensum creditorum.*" *Ibid., No. 14.* What more or less has been done in the present case?

5. The defendant pleads prescription. Ten years had elapsed between the sale from Spencer to Dick, (under which defendant holds) and the acceptance of the succession of Poultney by his children. The defendant and his authors were, therefore, possessors in good faith, under a title translative of property, and he comes within the provisions of articles 67 and 68, pages 487, 488, *old Civil Code.* The

circumstance of the succession not being accepted by the heirs, did not interrupt prescription, as prescription ran against the vacant succession. *Old Civil Code, page 468, article 62, and page 164, article 95.*

Neither did the minority of the children as *non constat*, that they would ever accept; and, until acceptance, the estate represented the *deceased* and not the *heirs*. *Old Civil Code, page 162, article 74. Pothier Traité de la Propriété vol. 8, No. 15. Ibid., Introduction au Titre, 14, vol. 10, No. 42. Domat, liv. 1, tit. 1, sec. 1, No. 14. Des Héritiers en général dig., liv. 41, tit. 3, l. 31, paragraph 5. Salgado, part 1, cap. 32, passim. pages 219, 220, &c.*

6. A *forced respite* can, with no propriety, be termed a contract between the debtor and his creditors. Contracts are in their nature voluntary, and the assent of both parties is essential to their formation. But a forced respite is binding even on those who do not assent to it. That is an anomalous species of *contract*, which is formed without the consent of one of the contracting parties. We contend, therefore, that a respite is a personal privilege granted by law to the debtor, and not being expressly extended to his heirs, it expires with him. Be this as it may, however, Spencer, under whom this defendant holds, was never cited, did not attend the meeting, and the proceedings consequently were not binding on him. *Bainbridge vs. Clay, 3 Martin, N. S., page 263. Thomas et al. vs. Breedlove et al., 6 Louisiana Reports, page 573.*

*Peirce*, for the warrantors, Wilkins & Linton, N. & J. Dick et al.

During the time that the inheritance was in abeyance, or was what is called a *hæreditas jacens*, all things rightfully done, concerning said inheritance, was binding upon any heirs who might hereafter accept. They take it subject to all charges which may have accrued. *Old Civil Code, page 161, article 72, and page 164, article 95.*

When, therefore, the heirs of Poultney, accepting the succession in 1833, proceed to make inventory and take

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possession of their ancestor's estate, opened since 1819, sixteen years before, they can only make inventory of, and take the estate as they find it. If by judicial proceedings, if by color even of law, if by formal acts, by judgments or under judgments, part of the property possessed by their ancestor, sixteen years before, is found to be owned, claimed or possessed by others, the presumption of just title, under such acts, proceedings, color or judgment, is with the possessor. That which they have now done, might have been done at the time of the death of their ancestor. They have neglected or refused so to do. They must take the succession as they find it, and if they deem that there have been informalities, or technical irregularities, by which they can recover any thing, supposed by third persons to belong to themselves, it is for these supine heirs to *prove* these *irregularities*, these *informalities*; it is they who allege them, and the burden of proof is therefore with them.

2. The District Court had jurisdiction over claims for debt of deceased persons, in 1819, and previous to the act of the 18th March, 1820. See 2 *Martin's Digest*, page 188. *Tabor vs. Johnson*, 3 *Martin, N. S.*, page 674. See section 16 of act of February 10th, 1813. It was certainly existing in the Superior Court, before the passage of the code. See *acts of 1805*. Was it taken away by the code of 1808? There are no repealing words; and if the jurisdiction of the Superior Court was taken away, it must have been by implication. It could not have been implied that the legislature intended to do that which they had no authority to do, and it is admitted by this court, that had the legislature intended to have given exclusive jurisdiction to the Court of Probates, in 1808, that they could not have succeeded in so doing, situated as that court was. *Ordinance 1785*, *Tabor vs. Johnson*, 681. That it was not the apparent intention of the legislature, who passed the code of 1808, to grant exclusive jurisdiction to the Court of Probates, is shown by the contemporaneous construction given to the code, by the decisions of this court, confirming that construction, by the want of power in the Court of Probates to carry

into effect such grant of jurisdiction. See 12 *Martin*, 231; where it is admitted to have been the uniform practice to that time, (August, 1822,) to bring such suits in the District Court. Upon the effect of a custom, see *Villadiego*, page 191, cap. 5, No. 11. See such custom established to be correct, by *Abat vs. Songy*, 7 *Martin*, 276. See what a ragged court the Court of Probates was before the act of March 18th, 1820, in *Waters vs. Wilson*, 3 *Martin, N. S.*, 138. This court declares that, previous to that act, the Court of Probates had no power to enforce its orders; that after a curator or heir had filed a schedule, and was ordered to pay the creditors, by the Probate Court, these same creditors would have to sue said curator or heir in the District Court.

3. If the court should abide by the latter decisions, the judgment rendered by the District Court, in such cases, are not absolutely void, and sales made in executing such judgments, give title to purchasers. *Foucher vs. Carraby*, 6 *Martin N. S.* 550. Before the act of 1820, the Court of Probates could not have ordered a forced surrender; the cases cited, occurred after that act, wherein it is said, as in *Dupey vs. Griffin*, 1 *Martin, N. S.*, 198, that the creditors could not apply to the District Court to order a meeting of creditors of a succession, even with the consent of the heirs.

They have since decided, that with such consent it could be done, see case 6 *Martin, N. S.*, 550, before referred to; and if the case had arisen before the act 18th March, 1820, they would have said that the District Court was the only court, inasmuch as the syndics made by the Court of Probates, could, in case of retaining the moneys, have defied the creditors and heirs, and Court of Probates. See case before referred to, of 3 *Martin, N. S.* 138.

4. There was no need to cite the children of Poultnay; they had not accepted the inheritance; they were minors; they had no power to accept; it was useless to call upon them to accept or renounce; they could do neither. *Old Civil Code*, page 162, article 80; page 164, article 90. *Salgado*, cap. 32, No. 5, 30, 31.

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5. The inheritance was a fictitious being, representing the deceased, who was the owner, *old Civil Code, article 74. Matienzo, lib. 1, title 4, gloss. 14, No. 3*, the minor children had nothing to do with it, and in no manner represented it until acceptance. *Salgado, cap. 32, No. 4. Matienzo, lib. 1, title 4, gloss. 16, No. 14*. A curator was appointed to represent this *hereditas jacens*, and by our law he was called syndic: the name makes no difference. *Salgado, cap. 32, No. 1*.

6. Poultney was insolvent when he died. His petition for respite asserts that he was unable to meet his engagements; he prays for a *concurso* of his creditors, which is formed in the District Court; this is one of the four kinds of *concursos* into which it is divided by *Salgado, part 1, cap. 1, page 2, No. 3*. This respite was accorded, but the *concurso* did not cease any more after giving him the respite, than it would have ceased after an unconditional surrender, and appointing a syndic; he became their syndic, as it were; he promised to pay in instalments; if he had failed to do so at the first period, the creditors could have assembled again, by suggesting this failure to this court. *Salgado, page 1, cap. 1, No. 44*. Poultney had instituted the *concursus*, and that is assimilated by the law to a case at issue between himself and his creditors. *Salgado, part 1, cap. 2, page 14, No. 9*. When he died, the respite did not extend to his heirs, for there were none forthcoming; his inheritance remained *jacens*, representing him and not the children; and if it did, they could only have accepted under benefit of inventory, being minors; in which case, the respite would not have benefited them. *Salgado, page 540, part 2, cap. 30, fin.*

It is a mistake to suppose that it was only the respite granted by the king, that ceased with the death of the debtor, for the case stated is of respite granted by creditors. See *Salgado, sup.*

The respite, then, having ceased by Poultney's death, there being a previous *concurso* formed by him in the District Court, and a case being at issue between himself and the creditors, it continued after his death; his own *procurator* or attorney joined in the application for a syndic

(or curator, as he would have been called under the Spanish law,) to be appointed. *Partidas 3, title 5, law 23.*

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It was enough, therefore, that his inheritance was represented by his attorney, his appearance was sufficient. *Parlador rer quot., lib. 2, cap. fin., page 5, sec. 9, Nos. 27, 28. Ibid., page 177, No. 20. Curia Philippica, page 66, part 1, section 12, No. 3.*

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7. The act of mortgage of Spencer could not have been declared executory against the heirs, for there were no heirs until *acceptance*.

8. To the objection, that in one of the cases of Spencer *vs.* the syndics of Poultnay, the act was not annexed, it is answered that this would not vitiate the sale made under the other, wherein the act was attached to the petition.

That these copies are taken out, or lost, or mislaid with ease, and after such a lapse of time, it is presumed to have been originally folded with the petition.

That the judge must have presumed to have granted the order on inspection of the act, and there is no law requiring it to be filed; that this and the objection that Ogden's power does not appear on record, cannot be pleaded to resist the authority of a judgment, if that judgment be otherwise rendered according to law. They might have been causes for exceptions, previous to the sale. *Cox vs. White, 2 Louisiana Reports, 424. Livingston vs. Walden, 4 Martin, N. S., page 457.*

9. To the eighth point of plaintiffs, that the prayer for a citation to the syndics was an abandonment, on the part of Spencer, of the *via executiva*, and that the order of seizure was improperly granted, I answer by the same authorities, and merely adding, that if it has any force, it was a privilege which the syndics could embrace or waive; the petition prayed that the property might be seized and sold, and the judge accorded the seizure and sale.

10. Spencer had a right to proceed against any person whom he found in possession of the estate, when it was a *hereditas jacens*, and there were no heirs of age to be cited or called upon. *Villadiego, 41, cap. 2, No. 64. Parlador, lib.*

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11. Act of 1817 does not apply to this case. *Kelsy vs. His Creditors*, 2 *Martin, N. S.*, 37.

12. The creditor has a right to purchase. *Salgado*, page 66, part 1, cap. 10, No. 16, 17. *Ibid.*, page 315, part 2, cap. 2, No. 14, 15, 16. *Parlador, lib. 2, de rer quot., cap. fin. sec. 13, No. 10. Curia Philippica*, part 2, sec. 22, No. 5.

13. Prescription is a valid plea against the present claimants, for the inheritance before accepted, represented a *major*, to wit: John Poultney, deceased, and not the minor heirs; and more than ten years had elapsed from his death to the time of acceptance. At that time, their acceptance could not have a retroactive effect to prejudice or injure rights, acquired during such interval. *Salgado*, page 220.

*D. Seghers*, for the heirs of Spencer, called in warranty:

1. The *pleyo ocurencia de acreedores*, or forced surrender, takes place at the instance of the creditors themselves, without being summoned by the debtor, and without his concurrence; as for instance, when a debtor dies, his creditors present their claims in the court of the *testamentaria*, each one requiring to be paid first. 4 *Febrero, ad. part 2, No. 39, page 18.*

2. The respite does not avail the heirs of the debtor, who dies before the instalments become due, unless they accept his succession unconditionally. 4 *Febrero, part 2, No. 243, page 123.* The same principle is laid down in *Salgado, part 2, cap. 30.*

3. Previous to the repealing act of 1828, the jurisprudence of Spain formed in the writings of her jurisconsults made a part of the law of Louisiana. The present case comes within the period when these laws were in force. *Saul vs. His Creditors*, 5 *Martin, N. S.*, 569.

4. The heirs of Poultney failed to accept his succession at his death, and the creditors who had accorded to him a respite, had a right to consider his succession as unrepresented; an acceptance on the part of the heirs being

necessary to vest the estate in them to authorise them to interfere in the affairs of his succession. *2 Louisiana Reports*

301. Civil Code, article 74, page 162.

5. It has been insisted that the acceptance of the succession by the heirs has a *retroactive* effect; but, even granting this position the inheritance must be taken such as it is, at the time of accepting, and the claimants can have no right to contest any sales or other acts which may have been made during the vacancy of the inheritance. *Civil Code, article 64, page 70.* If, therefore, all the property belonging to the estate has been sold to pay the creditors, the heirs are ever afterwards barred from receiving any part thereof.

6. The jurisdiction of the matter being in the district court, by the application of the deceased for a respite, that court was the proper tribunal for the creditors to apply for a forced surrender of the estate. That tribunal was not without jurisdiction *ratione materiae* in cases of vacant estates. Its jurisdiction has undergone no material change on this subject since the time of the decisions quoted by the plaintiffs themselves. See case of *Tabor vs. Johnson*, *3 Martin, N. S.*, 674. Also, *6 Martin, N. S.* 550. *7 Ibid.*, 378. *8 Ibid.*, 241. *6 Louisiana Reports*, 355.

7. The syndics being appointed by competent authority were the legal representatives of the vacant estate of Poultney. The right of the deceased debtor was divested by lawful acts done by lawful administrators. The sheriff's sale at the suit of Spencer against the syndics was legally made, and the title acquired under it valid and good.

8. The plaintiffs in their 10th point, object that an order of seizure and sale could issue in this case, and cite the case of *Chiapella vs. Lanusse's syndics*, *10 Martin*, 448, in support of their objection. That very case shows that *creditors* alone, not heirs, had a right to make the objection; whatever irregularities may have crept into these proceedings, none but creditors can complain, or inquire into them.

9. In their 12th point, the plaintiffs object to the right of Spencer, as a seizing creditor, to purchase the property

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So far as minors are prejudiced by the negligence or omissions of their tutors, and in the sale of their property, as such, the title being fully vested in them, when it is made without all the formalities of law being complied with, they are entitled to restitution. See *decision in preceding case, ante* 321.

But as regards the ordinary disposition and sale of the property of an estate, in which the rights of minors are contingent and residuary, and which is subject to the claims of creditors, the acquired rights of third persons resting on the faith of judicial proceedings will not be disturbed, as the rules and forms for selling minors' property do not apply. *Ib.*

sold to pay his debts. The Spanish law confines this prohibition to the case of a pledge; but even if it extended to mortgages, there was no positive inhibition, and if it be an irregularity, the creditors alone can object. *Partida 5, tit. 13, law 44.*

10. There was no necessity to have the act of mortgage, importing a confession of judgment, declared executory against the heirs; that is not required, except when the creditor wants to proceed against the *person or the property of the heir*. *Civil Code, article 229, page 200.*

11. In the present case, the heirs, being minors, could not have accepted *purely and simply*. They had no right to prevent the creditors from taking possession of the estate. Citations to them would have been nugatory. *3 Febrero, ad., part 2, No. 143, page 57.*

12. The plaintiffs insist the proceedings were irregular, because both remedies (*the via executiva and ordinaria*) could not be resorted to at the same time. The first alone was acted on; the other, therefore, may be considered as abandoned. It is immaterial whether citation was served on the syndic or not, as the return shows, notice of the seizure was served, which is sufficient.

*Bullard, J.*, delivered the opinion of the court.

The principles which must govern in this case, are precisely the same upon which that of the same *plaintiffs against Cecil's Executor*, was lately decided; and the same judgment must be rendered, for the reasons particularly set forth in the opinion of the court in that case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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**POULTNEY'S HEIRS\* VS. BARRETT ET AL.**

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a corporation alienated a lot of ground subject to a ground rent of six per cent. per annum, on one thousand seven hundred and twenty-five dollars, payable quarterly, with condition that if two or more quarters remained unpaid, the alienor may enter and take possession: *Held*, that when the premises were transferred to a third possessor, who died without paying the arrearages of rent, a sale by the syndics of his creditors provoked by the corporation, divested his title thereto, so that his heirs at law cannot recover.

When the right of entry stipulated for by the corporation became absolute, by arrearages of rent accruing, and non-compliance with the conditions, the purchasers and vendees are mere tenants at will, as the corporation had the right to enter at any time.

This is an action of revendication. Suit was instituted the 11th of February, 1833, by Mathilde and Emilie Poultney, minors, above the age of twelve years, assisted by their mother, Emilie Toutan Beauregard, widow Poultney, as natural tutrix, and J. R. Grymes, as under tutor. They claim, as heirs of the late John Poultney, their deceased father, a lot of ground on Canal-street, in New-Orleans, now in the possession of the defendant, which they allege was acquired by their ancestor, during marriage, under a notarial act of sale from B. P. Porter, and the widow of A. W. Depeyster, in her own behalf and as tutrix of her minor son, dated the 5th May, 1818.

Barrett answered, pleaded the general issue, and called William Deacon, his vendor, in warranty, and also John Hagan, who was bound to him for one-half of the lot.

\* This and the two preceding cases of *Poultney's Heirs vs. Cecil's Executor*, ante 321, and *same Plaintiff's vs. Ogden*, ante 428, were all tried at the same time, and the facts and arguments applicable to the plaintiffs' claim and title, are the same in all, and are so considered and reported.

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1. Deacon answered, denying the plaintiffs' right to sue or to the property claimed, and that they have never legally accepted the succession of their father.

2. Poultney never legally acquired the property, and his heirs can have no title.

3. That the lot in question was sold by the corporation in 1812, subject to a ground rent to Poultney's vendors, which remained unpaid for a series of years until the 21st December, 1822, when George Lloyd, who had been put in possession of it with the other property of Poultney's estate, as sole syndic of the creditors, caused it to be sold for the rent then due on it, when he (Deacon) became the purchaser for a valuable consideration.

4. He calls the corporation of New-Orleans in warranty.

The evidence showed, that the act of sale from the corporation of New-Orleans to Porter and Depeyster, dated the 19th of May, 1812, of the lot in question, contained a clause "that if the grantee or his assigns, should petition for a respite or cession of property, they should forfeit all their title to the lot," &c. This made part of the property in Poultney's schedule when he applied for and obtained his respite.

On the 21st of December, 1822, on motion of L. Moreau Lislet, Esq., attorney for the corporation of New-Orleans, it was ordered by the District Court, that the syndics of John Poultney do sell the lot acquired from the corporation by the said Poultney, to satisfy the rent due "to said corporation, after fifteen days advertisement from the service of this order."

The lot was sold accordingly, subject to a ground rent of six per cent. on one thousand seven hundred and twenty-five dollars, due to the corporation, and William Deacon now called in warranty, became the purchaser for the sum of two thousand seven hundred dollars. George Lloyd, as sole syndic of Poultney's creditors, passed an act of sale to the purchaser before Michel de Armas, notary public, the 18th January, 1823. This is the title on which the defendants rely.

The facts on which the plaintiffs rest their claim to recover as heirs and in right of John Poultney, their deceased

ancestor, are fully stated in the report of the case of *Poultney's heirs vs. Cecil's executor*, ante 321.

The district judge who presided at the trial, in delivering his judgment, after stating the facts of the case, proceeds: On the previous argument of this cause the plaintiffs insisted on the following points:

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1. That the defendant having given in evidence the title under and through which John Poultney held and owned the property, he cannot now question it.

2. That the District Court was without jurisdiction of the case of Poultney's estate, in appointing syndics, ordering the sale of the property, &c., and that the sales made in pursuance thereof are null and void.

3. If the District Court had jurisdiction, its proceedings in this case did not divest the minors Poultney of their rights, who were not parties thereto. The estate of Poultney devolved immediately at his death on his heirs, and nothing has been done legally to divest it; minors are especially protected by our laws; these proceedings were entirely *ex parte*, and the succession was actually opened in the Probate Court, where the creditors should have presented, liquidated and settled their claims.

4. That with regard to the property in question, the corporation never exercised its right of entry for the non-payment of rent or forfeiture, but pursued Poultney's estate, as if he was a common debtor, and had the property sold for their common benefit, thereby confirming the sale; that the rents have now all been paid, and the receipt of the corporation is a waiver of any claim to forfeiture.

On the part of the defendant and warrantors, it was contended.

1. That the plaintiffs must recover on the strength of their own title, and for that purpose must show a perfect one; that the title from Porter and Depeyster is imperfect, being in part minors' property conveyed by the tutrix without the legal formalities; and that Poultney never signed the act which was necessary, as it contained an assumption of covenants by the vendee.

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2. That the act of sale by the corporation did not vest title in the vendee; that Poultney's title was forfeited for the non-payment of the rent. *Clark's heirs vs. Christ Church*, 4 *Louisiana Reports*, 286.

3. The heirs have no rights; Poultney's succession was insolvent; his widow renounced and declined accepting for the minor heirs, or taking any part in its administration; and had she accepted for them with benefit of inventory, they would only have been entitled to the residuum of an insolvent estate after payment of its debts.

4. That under the law, as it stood at the time Poultney's succession was opened, until an acceptance or renunciation, the inheritance was considered as a fictitious being, representing in every respect the deceased, who was owner of the estate. *Civil Code of 1808*, article 72, page 162.

5. That this was a peculiar clause, not in the French Code, or the present Louisiana Code; and that this fictitious being could be pursued in the District Court, and the creditors could only proceed against the estate, as for a forced surrender. 7 *Febrero, ad.*, No. 18, part 19, 123.

6. That the creditors had a right to the estate, and were not required to give it up even to the beneficiary heirs, until the debts were paid; that the syndics actually did apply to the Probate Court, and had its administration decreed to them by that tribunal; and that the heirs were not entitled to the benefit of the respite granted their ancestor. 7 *Febrero, ad.*, 123.

7. The jurisdiction of the District Court extended to the trial of all civil cases. 2 *Martin's Digest*, 188. And that the powers of the Probate Court, under the act of 1804, 3 *Martin's Digest*, 472, sec. 2, only extended to the proof of wills, appointing curators, making inventories, &c.; that the Superior Court which preceded the District Court, had universal jurisdiction, &c., which could not be restricted by the Civil Code of 1808, as the first was established by act of congress, the latter by the territorial legislature. The powers of the late Superior Court remained undisturbed until 1812, when they were given to the District Court.

8. That the act of the 18th of March, 1820, relative to the Probate Court, was promulgated after the proceedings of the creditors of Poultney's estate in the District Court, had commenced, and could not affect them; and this act did not confer exclusive jurisdiction on the Probate Court; that was not done until the adoption of the Code of Practice in 1825.

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9. The proceedings by the creditors against Poultney's estate, commenced in the District Court, in 1820, while the decision in the case of *Abat vs. Songy's estate*, made in 1819, was in full vigor, and was not liable to the want of jurisdiction.

10. That Poultney's estate, at his death, was in a peculiar situation; no one would give the security and administer it in the Probate Court, and was not expressly provided for; and was, therefore, within the equity powers of the District Court, as provided for by the *Civil Code*, page 6, article 21.

11. That when the property of a succession is sold to pay debts, it is not sufficient to show that formalities were complied with. Lesion must be shown. 6 *Febrero, ad.*, 499. 2 *Moreau & Carleton's Partidas*, 1153, 1156. 7 *Peters*, 469. In the latter case, the Supreme Court of the United States, held, "that where sales were destitute of formalities, but good in substance, they will be sustained; that infants in that case, were held bound to take notice of public acts, and were bound by them.

In deciding on this case, which is a suit to annul judicial proceedings for defects of form, in not pursuing the required formalities in disposing of an intestate insolvent estate, it has given rise to some general reflections.

Having received my legal education in a state where great strictness of practice was observed, after a very short acquaintance with the laws of Louisiana, it struck me that comparing the multiplied requisitions of the civil and statute laws with the manner in which legal proceedings were conducted, very few titles based on judicial constructions had the strict legal requisites for validity. Scarcely a suit was conducted with legal regularity: the clerks and sheriffs and frequently the judges were taken from the ordinary pursuits

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of life: many of the lawyers had not received a regular professional education; and the greatest irregularity arising from good faith and a loose mode of doing business, existed in conducting business in every department of the state administration. There has been great improvement, but much irregularity exists and always will exist.

When I first came to preside in this court, in 1832, it was matter of astonishment to clerks, sheriffs and attorneys, that I required the return of service of citation to be read and to be conformable to law, before judgment by default was granted; and it was found that when the service was not personal, not one return of service of citation was regular and legal, and ought to have been received as the foundation for a judgment by default; yet, on such returns, they had been granted and confirmed; and, on examination, it was always found that service had been properly made, it was only the return that was deficient: the substance had been complied with, the form had been omitted.

The same change has taken place in commerce. In the good old Spanish times, notes were not asked nor given; a verbal promise was relied on. Now, it is nothing but notarial acts, notes, endorsements and protests. Let us not, therefore, judge of the past by the present, or apply rules now adopted, in judging of past proceedings: let us, if we can, put on the spirit of good faith, in judging of past proceedings, and not apply Codes of Practice, new notions and self-conceit, to the acts of our predecessors, but decide on them with great allowance for the changes that have taken place even in a very short period of time, and regard more, if there be, substance than form.

It may be observed, that in every state in the Union it has been found necessary to modify, and even change what were considered fundamental principles of the law adopted; and that, not by statute only, but also by decisions of the courts and general practice. This has been done to a great extent in the state of New-York, which has most closely followed the system of English law. Our peculiar situation and state of society imperiously demand those modifications.

Let it also be observed, that the wonderful changes which exist between the present mode of practice, and even of the law in England, and what prevailed three centuries ago, were not made by statute, but were suggested and adopted by convenience and experience. They have produced, in many respects, a revolution in the law.

It would be affectation and pedantry if I were to scan the various and important differences in ancient and modern practice in England, which an education at the feet of a Gamaliel in the law, in the city of New-York, made me familiar. My mind is, I believe, imbued with a love of technicality, though I like to see good pleading, from its close relation to strict logic.

I have been struck with the spirit of literal interpretation and rigid technicality which prevails with persons entrusted with the execution and interpretation of laws; such as directors of companies, &c.; while lawyers, judges and men of generalizing mind, look more to the object, purpose, spirit and intention of the law; and, perhaps, not always sufficiently so.

The necessity of a free presumption and liberal interpretation, to protect the validity of judicial proceedings, has been felt by our own court of last resort. It cannot be denied that the decisions in the cases of Barabino *vs.* Brashears, and Lafon *vs.* Lewis, are a free departure from the strict principles of law, applicable to the subject of proceeding; but a departure called for, justified and rendered necessary by the mode in which judicial proceedings have been conducted; by the manner in which executive, and even judicial offices had been filled: the first by persons who had no previous acquaintance with the duties of the offices they were called to fill; and the last, by persons partially acquainted with the system they were called to administer, and ignorant of its practical rules and law. In these respects, we may yet be called a colony of France and Spain.

What may be called the law of practice, or modes of conducting business must, after all, depend on the existing modes which courts and practitioners find convenient, choose

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BARRETT ET AL.** Every state in the Union, with the exception of Louisiana, adopts the Common Law of England, and yet every state in the Union has adopted a local practice, which differs from the practice in England, and every one from each other, even in those matters not regulated by statute. There is, therefore, a law of practice resting in practice in every state in the Union, and that law of practice varies from time to time, according to circumstances.

In the early stages of colonization, it is loose, resting on good faith and general convenience. As population increases and transactions multiply, and good faith vanishes, it becomes more rigid and scrutinizing, and it cannot be called a prediction to say, that fifteen years hence our successors will find as great irregularities, anomalies and apparent illegalities in our present modes of conducting business or practice, as we affect to find in the modes of doing business of our predecessors, fifteen years ago.

The spirit of these remarks is exemplified in a decision in the case of *Leasdale vs. the administrators of Branton*, 2 *Haywood's N. C. Reports*, 377.

To a *scire facias* on a judgment, *nul tiel* record was pleaded: when produced, the record showed the verdict, but no judgment had been regularly entered. The court decided, "we must presume according to the loose practice of this state, that there was a judgment; and, therefore, we must say there is such a record;" thus substituting a *presumption* against a *fact*.

This decision was made in 1805, in the Circuit Court of the United States for North Carolina; the circuit in which Chief Justice Marshall presided.

If the books were searched, numerous instances of the necessity of similar presumptions might be found, and that it has frequently been necessary to look to the acts, intentions, circumstances and understanding of parties, and not to the manner in which they were carried into execution or the very defective forms in which they appear recorded.

The necessity of viewing matters in this light and deciding in conformity with these principles, is greatly increased in a country and in a city such as ours, which, undergoing such constant changes, immense improvements and fluctuations in value; where a city expands itself with the rapidity of a change of youth to manhood.

If the value of property remained stationary, we should see less of this eagerness to upset titles for defects of forms; and, in point of justice, regard should be had to the value of the property at the time of the sale. If the full value of the property at the time of the sale has been paid, and the money applied to pay debts, it is all that ought to be required.

To apply ourselves to the case before us, the objection made by the defendants' counsel to plaintiffs' title, in consequence of Poultney not having signed the act of purchase from Porter and Mrs. Depeyster, the want of production of the decree referred to, &c., might have been urged inasmuch as in such an act of sale, the vendee is to bind himself to various obligations and covenants towards the corporation, and as a plaintiff must recover on the strength of his own title, if the defendant had confined himself to the general denial; but, as Deacon the last person called in warranty, has set up a title derived under and through Poultney, he cannot be allowed to question Poultney's title.

It is clear to me that the acts, pleadings, admissions, &c., of a person called in warranty are binding on those who call him in, unless collusion be shown between him and the plaintiff in the suit.

With regard to the position advanced by defendants' counsel, that minors cannot recover against sales of their property, unless lesion be shown, the authorities cited do not expressly support a principle which would apply to the present case: they apply to contracts made by the minor or his representative. An analogy of reasoning would apply on the assumption, that the widow Poultney is to be considered in truth and substance, as a party to the suit of insolvency, as well by having had full notice, as by having executed the decree appointing syndics, by surrendering up the property to

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be administered by the syndics, and joining them after their appointment in powers of attorney to recover the succession and estate of Poultney to be administered by them. If, therefore, not lesion only in its legal sense could be repelled, but if it could be shown that the property brought a fair, full price, according to the value of property at the time, or if it did not, and the complement of the price according to its value at that time was now made up, all the purposes of justice and equity, and of law would be answered.

For, as the estate is clearly shown to have been insolvent, and there was an absolute necessity to sell the whole of it to pay the debts, and even then, there would have been deficiency, justice and law would be answered if the estate was accounted for, according to its then value.

It exhibits a glaring departure from justice, that the children of an insolvent should claim an estate when the debts are unpaid, or for aught that appears, the estate was sold in a *bonâ fide* manner for the payment of those debts, and brought its value, which was insufficient for that purpose: stripped of artificial reasoning, I consider the case of Livingston *vs.* Moore, 7 Peters, as in truth decided on these principles.

Upon the whole matter, I come to the following conclusions:

1. That the widow Poultney was natural tutrix of her children, by virtue of her relation to them, and the oath is not necessary to make her such, or her acts binding on them; that if a parent assumes to act as tutor without being sworn, and the objection is taken, the objection would be sustained as a means of enforcing obedience to the law, but that the natural tutor is such by virtue of relationship to the minor, and his acts and conduct are binding, without his having taken the oath. This conclusion is reasonable and just, and is strongly supported by rules of law; for if the mother declines the tutorship, and of course is not sworn, still she remains tutrix till another is appointed. *Civil Code*, 271. That whatever is done actively or passively by the tutor so far as he may by law do or suffer as tutor,

is as binding on the minor as it would be on the tutor himself, if it were his own affair.

2. That at the period when these proceedings were had, the jurisdiction of the different courts of the state, was not well settled or defined; nor do the laws, conferring jurisdiction, contain words of privation and exclusion. That with regard to these matters, existing practice and the acts of judges, courts, sheriffs, clerks, lawyers, &c., must be considered as the best, being contemporaneous exposition, or that common error, more especially on a matter of practice, must make law.

That it is of dangerous consequence, to test former proceedings by present laws, opinions and notions.

That where a loose practice has existed, courts must sustain it as law by every presumption.

That assuming the utter insolvency of Poultney's estate, its magnitude, and the magnitude of the debts, and the impossibility of any one giving adequate security, and the widow having renounced, and no one claiming any curatorship, &c., it was an omitted case in the law, and the courts were bound to apply a remedy under the discretionary power, conferred in express terms, by article 21, Code of 1808, viz: "In civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is made to natural law and reason, or received usages where positive law is silent."

That the article applies not only to the mode of deciding, but also to the remedies, where none are provided for the circumstances of the parties.

That even the provision contained in article 1178 of La. Code, that the judge shall administer small successions, or where the succession is so much in debt that no one will accept the curatorship of it, has been found insufficient, and the act of 1826, page 438, sec. 7 of Martin's Digest, provides for the appointment of syndics.

That recurring to 1819-20, it might well be held under the decisions then in force, that the Court of Probates could

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not order syndics to be appointed, as it was without contentious jurisdiction for debt; and an insolvency involves every species of contention and litigation. That the Probate Court had not jurisdiction over claims for debts at that time, appears from the act of 1817, page 188, enumerating cases in which appeals were allowed in a special manner, and no appeal is given for a judgment for a debt, but only for judgments making certain orders, &c., and as the constitution provides, that appeals for matters in dispute over three hundred dollars, lies ultimately to Supreme Court, and no appeal for judgments for debts over three hundred dollars is provided from Probate Court to Supreme Court, such claims could only be sued in District Court, and that court rightly had jurisdiction in an insolvency which relates to debts.

That the matters in evidence show such a state of things, as fully warrants the exercise of jurisdiction, and the course pursued.

It is not a little singular to observe the coincidence of different systems of jurisprudence in different countries. Erskine says, "the word bankrupt is, in our law, sometimes applied to persons whose funds are not sufficient for their debts; and sometimes not to the debtor, but to his estate. There was no method known in our law, for the proper sale of a bankrupt estate, so as the price might be divided among the creditors, *title 1681, cap. 17*, by which the Court of Session was empowered, at the suit of any real creditor, to try the value of the debtor's estate, and name commissioners to sell it for the payment of his debts." This act was amended in 1690, and provides for debtors dying insolvent: the debtor or his apparent heir, and all the real creditors (viz: creditors by mortgage,) were according to the act, to be made parties to the suit; other creditors were to be called by edictal citation. He proceeds to lay down the mode of carrying through the suit. It was a statutory remedy, and commissioners are another name for syndics. The proceeding was in the Court of Session, which corresponded with, but was more extensive in jurisdiction than our District Court. The

case was considered as not provided for, although the Scotch law is based on the civil law.

There is some plausibility in the argument, that the Probate Court may be considered to have confirmed the appointment of syndics, by ordering the property to be delivered to them when applied to for that purpose.

3. That, according to the state of jurisprudence in Louisiana in 1819, an estate did not immediately descend to, and vest in the apparent heir on the death of the ancestor, but remained in suspense, both as to ownership and possession, until it was accepted ; that no heir at that time was presumed either to accept or renounce ; that the regular course would have been to call upon the mother, as tutrix, to accept or renounce, and if a renunciation was made and no person would offer as curator, I conceive an appointment of syndic by the District Court, would have been rightly made ; but inasmuch as the law did not cast the succession on the heir, if the heir neither accepted or renounced, the succession was an abandoned one, and any legal course of administering it, and acts done in pursuance of such administration, would bind the title of the property.

That, in the present case, where Poultnay was insolvent during his lifetime, and declared himself to be so ; when the mother and tutrix, after deliberation, and aided and advised by friends and counsel, had renounced and abandoned rights equal to those of the children, and which renunciation was obviously understood and conceived by all parties to embrace and include a renunciation for the children ; when she was apprised of the proceedings, executed the decree by delivering up the property and joining the syndics by powers of attorney to other states, to recover the property of the succession. All these facts and circumstances constitute such a state of things, that, in accordance with the North Carolina decision, a court or jury ought to presume a renunciation by the children of an insolvent succession, all the debts being then due, the respite having expired with him.

4. That, although the strictly regular mode of proceeding, would have been to have cited the mother of the minors to

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accept or renounce the succession on their behalf, as she had decided for herself; and if the succession was accepted, then the mother could have been sued as tutrix, or compelled to give security, and the estate sold on decrees against her; if renounced, a curator or syndics, &c. could have been appointed to administer and distribute the succession among the creditors. But as equity may be administered in relation to the substance of any right, claim, contract, &c., I do not see why courts may not look into and through forms, to see if the substance intended by those forms was not complied with. It is assumed that Mrs. Poultney was tutrix of her minor children; that she had renounced for herself; that she was fully apprised and informed of these proceedings. This assumption and presumption is based on the fact, that the friends and counsel who had advised her to renounce, had provoked the insolvent proceedings. It was an event which could not take place without her knowledge. All Poultney's property which was in her possession, was surrendered by her, except the furniture, which remained in her possession by consent of the syndics, in executing powers of attorney to collect Poultney's estate, she must have had a perfect knowledge of, and sanctioned these proceedings.

If a party not cited executes the judgment, it is binding.  
*Code of Practice*, 612.

She had renounced for herself, and could only act for the minors. The syndics had her authority and approbation, and may be considered as her agents.

Presume an acceptance for the children, and the result, in my opinion, must have been the same.

I consider this a case in which the substance was performed, although strict forms were not followed.

As it seems a general practice, either from want of confidence in ourselves, or from indolence of mind, or a desire to show that the judgment is not made under the bias of any circumstances which might mislead the mind in the particular case to be judged, that the decisions of judges and courts must rest on the crutches of authority, rather than on arguments derived from reason, justice and propriety.

I quote the following authority from the decisions of the *Roman Rota*, as given at the end of *Paz Praxis*, Dec. 13. No. 7, 8 and 9. This decision is given in a case treating of *restitutio in integrum*, for want of citation and a curator to a minor :

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No. 7. "*Auctoritas judicis supplet defectum citationis.*"

No. 8. "*Defectus curatoris nullitatem non paret ubi eo deputato sententia declinari non potuisset.*"

No. 9. "*In negotiis minorum non tam quomodo et quibus solemnitatibus, sed quid in substantia factum sit inquisitur.*"

I repeat an authority heretofore cited by me, from 2 Philimore, 224: "The process of citing parties is a convenient one for all suitors, because when that is done, you need not actual privity, the law presumes actual privity after the legal process, the *lis pendens*, is sufficient notice that parties should appear and protect their own interest; but if you can prove actual privity, the legal process in point of solid justice and sound reason is superfluous, though *ex abundanti cautela*, it may still be convenient to resort to it, and have it upon record in another place."

"Spectators to the whole, and privity to the whole, if they had been dissatisfied, they might have intervened at any moment of the proceedings. This right of intervention coupled with privity to the proceedings, is decisive to show that they can have sustained no prejudice, by not having been before cited, and not having given a formal appearance." Again a defendant having notice of a decree to which he was no party, paid money contrary to that decree: ordered that he should pay the money over again. 2 Chitty's Digest, 154. Notice of a mortgage is equal to registry, and the many English cases where notice of the attorney, or rather knowledge in him, is notice to the party.

In my view of the facts of this case, for the reasons before assigned, I am satisfied as to the fact that Mrs. Poultnay had full notice of these proceedings; that she executed the decree by delivering up the estate to the syndics, and finally, that as tutrix she sanctioned all these proceedings, by joining them in executing powers of attorney.

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And if No. 8 of the decision cited is of any weight, and it has the full force of reason and justice with it, it is clear that nothing that she or the minors could have done, could have prevented the sale of the property in question.

There is also a strong parallel between the present case and that of Keene *vs.* M'Donough, 8 Peters, where the validity of the judgment was maintained, although no attorney was appointed in the original suit, to represent Keene, the absent defendant.

5. That the act of the city corporation in requiring the sale of the property in question, may properly be considered as an exercise of their right of entry and forfeiture, both for non-payment of rent and Poultney's failure. The motion is to sell the lot to satisfy the rent; Mr. Fleitas testifies rent was due: this is every way probable in the course of things. After Poultney's death no one had a direct interest to pay the rent; after the order is executed, the oath of the creditor is of no moment, if the rent was really due; it may have been proved at the time, and the syndic by his acts admitted it.

The motion was made on 21st December, 1822, after respite had expired, to sell on fifteen days' advertisement; it was sold on 15th January, 1823; if the proceedings were governed by analogy to the insolvent law, there was no law to require a longer advertisement.

I repeat, it may be considered as an entry and sale by the corporation under their right of entry and forfeiture, although they might wish to give the estate the benefit of any advance or additional value; and this being done, all was done that the most strict justice could require. I consider that the court is bound to support these judicial proceedings and decrees of the highest court of original jurisdiction, if by any reasonable intendment they can be supported; and the case appears to me parallel to that of Clark's heirs *vs.* Christ Church, and to be supported on the authority and reasoning of that case.

In 1818, the property was bought by Poultney for two thousand and fifty dollars. He estimates it on his *bilan* at three thousand dollars. It sold for two thousand seven

hundred dollars at auction, which may be considered its fair value.

It is no question how this money was applied: there was a mortgage in favor of Porter and Mrs. Depeyster for one thousand three hundred and sixty dollars; probably two hundred dollars of rent; and there are three orders to pay, A. L. Duncan five hundred dollars, John R. Grymes five hundred dollars, and N. Morse two hundred and fifty dollars, for professional services; all taken at the very time of this sale and which probably absorbed the proceeds.

Be that as it may, the estate was insolvent: the corporation had a right of entry and forfeiture, and provoked the sale. The property was sold under the order of a court of high authority, obtained contradictorily with the recognised administrator of the estate and brought a fair price. No injustice was in reality done to these plaintiffs. The justice of the law is with the defendant, and the reare facts and law enough, in my opinion, in the case, to warrant a judgment in his favor. It is, therefore, considered, that there be judgment for the defendant, and that plaintiffs pay costs of suit.

*Grymes and J. Slidell*, for the plaintiffs.

*Peirce*, for the defendant.

*Preston*, for Deacon, called in warranty.

*Eustis*, for the corporation of New-Orleans.

*Bullard, J.*, delivered the opinion of the court.

This case turns mainly on the principles of law, settled in the case of the same *plaintiffs against Cecil's executor*, decided at the present term. See *ante, page 321*.

The lot of ground in controversy, was purchased by Poultney, of Porter and the representative of Depeyster, who had previously acquired it from the city of New-Orleans, on a ground rent. After the appointment of syndics, the corporation provoked the sale of it, for arrearages of rent, and it

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Where a corporation alienated a lot of ground, subject to a ground rent of six per cent. per annum, on one thousand seven hundred and twenty-five dollars, payable quarterly, with condition that if two or more quarters remained unpaid, the alienor may enter and take possession: Held, that when the

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premises were transferred to a third possessor, who died without paying the arrearages of rent, a sale by the syndics of his creditors, provoked by the corporation, divested his title thereto, so that his heirs at law cannot recover.

When the right of entry stipulated for by the corporation became absolute, by arrearages of rent accruing, and non-compliance with the conditions, the purchasers and vendees are mere tenants at will, as the corporation had the right to enter at any time.

was purchased at sheriff's sale by W. Deacon, who conveyed to the defendant. Among the conditions of the sale to Porter and Depeyster, is the following: "*Et dans le cas où les acquéreurs viendraient à faire cession de biens à leurs créanciers ou en obtenir terme et délai, il est convenu que le vendeur en sa qualité ne sera pas alors censé lui avoir transférée la propriété du terrain par lui donné à rente perpétuelle par les présentes, en raison de ce qu'il n'en aurait pas reçu le prix capital. En conséquence, les dits acquéreurs ne seront considérés en ce cas que comme locataires ou fermiers ou possesseurs précaires de la chose, et la corporation de la Nouvelle-Orléans sera préférée sur ces terrains à tous les créanciers des acquéreurs quelqu'antérieurs ou privilégiés qu'ils soient, et sera habile à être réintégré comme ayant conservé le domaine réel des terrains.*"

Poultney purchased the lot, subject to the same conditions, and having obtained a respite from his creditors, in 1819, without paying the price, he became a mere tenant at will of the corporation, and the corporation had a right to enter.

4 *Louisiana Reports*, 286.

We are, therefore, of opinion, the title of Poultney was divested, and his heirs at law are not entitled to recover.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF  
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The Court of Probates is without jurisdiction in a suit for a partition, in which the defendant sets up title to the premises claimed to be divided, and the plaintiff alleges that the sale under which he claims is fraudulent and simulated.

In a suit for the annulment of a will and partition of the estate, where a supplemental petition is presented, alleging that part of the property of the estate has been sold to the defendant, as a disguised donation, and claiming to have it brought into the partition; this will be received and considered as an additional and component part of the original petition.

The Court of Probates has authority to decide on the character and validity of sales of land and slaves, when the question arises collaterally in the examination of other matters, in which it has jurisdiction.

So, where the natural son is alleged to have received donations *inter vivos* disguised in the form of sales, which is required by the legitimate heirs to be brought into partition, the Court of Probates has jurisdiction to inquire collaterally into the character of these sales, to ascertain if this property is to be included in the partition of the whole estate.

This is an action by the legal and forced heirs of the late Thomas Farrar M'Caleb, Esq., to annul his last will and testament, and to have the property of his estate partitioned among all the heirs, according to law.

Thomas F. M'Caleb died the 4th November, 1832, leaving an olographic will, written and dated the 16th July, 1827, in which he bequeathed to his natural son, Charles Eugenius M'Caleb, a minor, all his property, both real and personal, of which he should die possessed, or had title.

The testator, at his death, had a father and mother, eight brothers and sisters, or representatives of these last, living.

**EASTERN DIST.** He appointed his father, David M'Caleb, of Claiborne June, 1835. county, and state of Mississippi, his executor, who accepted **M'Caleb et al.** and qualified as such, under the will. The testator enjoined it on his relations, who under the law, might claim a portion of his estate, to renounce the same to his natural son. **T. M'Caleb.** Theodore Howard M'Caleb, Esq., one of the brothers, renounced accordingly, in January, 1833. An inventory of the property of the deceased was taken, which amounted to thirty-two thousand nine hundred dollars.

In June, 1834, the present suit was instituted by the father, mother, and brothers and sisters, and the legal representatives of those deceased, with the exception of the brother who renounced, to annul the will and recover the property of the succession of the deceased, except one-fourth part thereof, which legally belonged to the natural son. They pray that the will be annulled, and the property, deducting the portion of the natural son, be partitioned among them.

The mother and natural tutrix of the natural son, pleaded a general denial; that the plaintiffs, by various acts and doings, have recognised the validity of the will, and can claim no rights under it, or any of the property belonging to the succession of the testator.

The plaintiffs filed a supplemental petition, in which they allege, the testator, in his lifetime, had made divers donations of property, which was included in the inventory, disguised in the form of sales to his natural son, as appeared by several notarial acts, which were specified. They pray that these dispositions be declared donations *inter vivos*, and brought into partition and divided with the other property of the succession.

The counsel for the defendant excepted to this petition, and averred that the Probate Court was without jurisdiction of the matter it contained. The exception was sustained by the court.

The parties went to trial on the original petition and answer.

The judge of probates, after hearing the testimony and the arguments of counsel on each side, decreed as follows:

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1. That by the will of the deceased, Thomas F. M'Caleb, he bequeathed the whole of the property, he died possessed of, to the defendant, his natural son.

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2. That it is in proof that the deceased had, at the time of his death, a father and mother, and eight brothers and sisters, living or represented; that, therefore, according to law, he could only dispose of one-fourth of his succession in favor of his natural child, (*Louisiana Code*, 1473,) but that by his disposing of the whole in favor of his natural son, his will was not thereby rendered null, but the disposition in favor of the defendant, is reducible to one-fourth of the whole succession. *Louisiana Code*, 1489.

3. That by means of said reduction, the father and mother of the deceased would have become, by operation of law, entitled to one-half of the remaining three-fourths of the succession, to wit: to three-eights thereof, and the eight brothers and sisters, to the other half of the said remaining three-fourths, or three-eights thereof. *Louisiana Code*, 899.

4. That David M'Caleb, the father of the deceased, who had been appointed by the will testamentary executor, having after homologation thereof, been sworn in said capacity, and having acted as such, thereby recognised the validity of said will, and waived the rights afforded him by the article 1491 of the *Louisiana Code*, of suing for the reduction of the donation made to the defendant, as regarded himself.

5. That with regard to the mother of the deceased, it being in proof that she and her husband live in the state of Mississippi, and that the common law prevails in that state, and it appearing that under the common law, (of which this court does not pretend to have the least knowledge,) the husband is vested with all the rights of his wife, the acquiescence of David M'Caleb, the father of the deceased, to the will, was also the acquiescence of his wife, the mother of the deceased.

6. That by act executed before G. R. Stringer, notary public, on the 18th of January, 1833, T. H. M'Caleb, one of

**EASTERN DIST.** the brothers of the deceased, renounced all his rights, titles,  
*June, 1835.* interest and claim in and to the succession of the deceased.

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From the principles laid down in the foregoing decision, the probate judge decreed the portions that each heir would be entitled to. From this decree the plaintiffs appealed.

*Strawbridge* and *Gray*, for the plaintiffs, maintained the jurisdiction of the Probate Court on the authority of adjudged cases in this court, strongly analogous to the present one. 5 *Martin, N. S.*, 214. 6 *Ibid.*, 304.

2. The property claimed in the supplemental petition is put in the inventory as property of the deceased, and the judge of the Probate Court must necessarily determine, whether it is to be taken into the account or estimate of the estate in decreeing a partition thereof. The court must, collaterally inquire into character of the sale and whether the property made part of the estate. If this were not done, the end would be conceded without the means. The rule is "cum quid conceditur; conceditur et hoc per quod pervenitur ad illud." 6 *Martin, N. S.*, 304.

3. By the Roman law, the "man made his own heir"; by that of the customs adopted by the *Code Napoleon* and incorporated into the Louisiana Code, the *law* makes the heir, not the will of the testator. Institution of heirs are considered but as legacies made to legatees, and valid only as to the disposable portion. The heir of blood is seized by law. The instituted legatees or heirs are obliged to demand of them the delivery of their legacies. 5 *Toullier, No. 117-18, page 116.* *Chabo's Commentaires, tome 2, page 13.* *Code Napoleon, article 511, 756.* *Louisiana Code, article 1003-4, 1599, 1600.*

4. As against the *natural son*, ascendants, brothers and sisters, have a legitime; consequently have the right to reduce the testamentary dispositions to the disposable portion. *Louisiana Code, 1473-4, 1599-60.*

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5. The construction of article 1015 of the Louisiana Code, contended for, does not apply. The meaning is simply this: that in testamentary successions, where the heir or legatee renounces, his share does not go to *his heirs* according to the *Code Napoleon, article 786*, and the first part of article 1015, but to the legitimate heirs. This interpretation is confirmed by articles 1699, 1700-1-2, farther on in our code, which provide "that every part of the succession remaining undisposed of, &c., shall devolve upon the legitimate heirs." The adverse construction proves too much; if there is no right of accretion at all, in testamentary dispositions like the present, how can the minor in this case take the portion renounced by the collateral heirs.

6. Admitting for a moment, the right of the wife of D. M'Caleb, was a chose in action, (they residing in a common law state) a voluntary assignment by the husband without consideration would not bind her; and this at best, is but an implied *renunciation* of her right without consideration. *2 Kent's Commentaries, 115.*

*J. Slidell, contra.*

*Martin, J.*, delivered the opinion of the court.

This is an action to annul and set aside a will, and to recover the property of the testator. The late Thomas Farrar M'Caleb, died in November 1832, and in his will left all his property to his natural son. He appointed his father, who resided in the state of Mississippi, the executor of his last will and testament, earnestly requesting that he would carry his will into effect. Besides, his father, the mother and eight brothers and sisters, or descendants of these, were still living and residing in that state. His father took upon himself the administration of the estate. One of the brothers renounced his share in the succession.

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The father and mother and all the brothers and sisters, or their descendants, (except the brother that renounced,) are plaintiffs, and have instituted this suit against the natural son, assisted by his mother and natural tutrix, who are made defendants. The prayer of the petitioners is, that the will be annulled, and that the estate of the deceased, after deducting that portion of it which the law permitted the testator to bequeath to his natural son, may be delivered up and partitioned among the legitimate heirs, the plaintiffs in this suit.

The answer of the defendant avers, that the plaintiffs, by several acts they have done, have recognised and acknowledged the validity of the will, and have thereby deprived themselves of the faculty and power of contesting the defendant's right and claim to the property under it.

In a supplemental petition, the plaintiffs further alleged, that the testator had, in his lifetime, made donations of land and slaves to the defendant, disguised under the form of sales. They therefore pray that this property be also divided and partitioned out among them.

When this supplemental petition was presented, an exception or plea to the jurisdiction of the Court of Probates was put in and sustained.

The court proceeded to decide upon the original demand, as set forth by the plaintiffs, and decreed a partition of the estate, and directed that the defendant, as natural son, was entitled to one-fourth of the whole succession of his father, which was the disposable portion; that he is also entitled to three-eighths of the whole succession, for the shares renounced by the father and mother of the deceased, in consequence of the former having accepted the executorship; and to one-eighth of the three remaining eighths of the whole, for the share renounced by T. H. M'Caleb: that these rights or shares devolved on him as instituted heir. This basis made the defendant legal owner of forty-three sixty-fourths of the entire succession. From this decree, the plaintiffs appealed.

The first ground of complaint by the appellants, is made to the decision of the Court of Probates, sustaining the exception to its jurisdiction, in relation to the matters set forth in the supplemental petition. Had this petition been the only one, and the basis of the action, the case could not have been distinguished from that of *Reel vs. Knight*, 5 *Martin, N. S.*, 10, in which we held that the Court of Probates was without jurisdiction in a suit for a partition, in which the defendant set up a title in himself to the property in contest, and the plaintiff alleged that the sale to the former was simulated and fraudulent.

In this case the supplemental petition is, in the opinion of the court, to be taken and considered in conjunction with the original one, to which it is merely an addition and component part.

In this point of view, the present case has a much greater resemblance to that of *Baillo et al. vs. Wilson et al.*, 5 *Martin, N. S.*, 214, and *Gill vs. Phillips*, 6 *Ibid.*, 304, in which it was decided, that the Court of Probates had authority to decide on the character and validity of sales of land and slaves, which made part of an estate, when the question arises collaterally in the examination of other matters, of which the court had jurisdiction.

In these two last cases, the court of probates was called on, to test the validity of certain conveyances of part of the estate, in order to ascertain its amount, for the purpose of a correct partition; and this court was of opinion, that in order to exercise its legitimate authority in the partition of the estate, avowedly distributable by this court, it became necessary, collaterally, to inquire into the character of these sales and conveyances, which comprise a part of the property forming the entire amount to be partaken. The Court of Probates could not know the amount of the whole estate without this; and its authority to go into this inquiry was conceded, although it would not possess this right, when every part of the property, the partition of which was sought, was denied to be a proper subject of partition by that

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The Court of Probates is without jurisdiction in a suit for a partition, in which the defendant sets up title to the premises claimed to be divided, and the plaintiff alleges that the sale under which he claims is fraudulent and simulated.

In a suit for the annulment of a will and partition of the estate, where a supplemental petition is presented, alleging that part of the property of the estate has been sold to the defendant as a disguised donation, and claiming to have it brought into the partition; this will be received and considered as an additional and component part of the original petition.

The Court of Probates has authority to decide on the character and validity of sales of land and slaves, when the question arises collaterally in the examination of other matters in which it has jurisdiction.

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court, but which was claimed under a sale and purchase by the defendant.

It now becomes necessary to test the pretensions of the defendant, to the estate of which the testator died in possession, and in order to do this, we are required first to ascertain, whether the latter made any donation *inter vivos* to the former, and if he did, what was the value of the property thus bestowed on the natural son? The law renders him incapable of receiving more than one-fourth of his father's succession, when there are, as in this case, forced heirs still living. If, therefore, he has received by donation, *inter vivos*, property, the value of which exceeds one-fourth part of the aggregate value of the entire property of the donor at his death, and that of the donation included, he has then received all the law permitted, so that his pretensions to any part of the estate left by the testator at his decease, must be rejected. If it be shown that he has received less than one-fourth of the aggregate value, the plaintiffs must be restrained, and the defendant allowed the sum, which added to the value of the donations he has already received, will make one-fourth of the aggregate amount of the succession, including the donations made in the lifetime of the donor.

So, where the natural son is alleged to have received donations *inter vivos*, disguised in the form of sales, which is required by the legitimate heirs to be brought into partition, the Court of Probates has jurisdiction to inquire collaterally, into the character of these sales, to ascertain if this property is to be included in the partition of the whole estate.

The Court of Probates cannot arrive at an essential and correct result, as it respects the amount of the estate to be divided, without testing the character of the conveyances in question, when one of the parties alleges them to be *feigned*, and the adverse party avers them to be *real* sales. The court must, therefore, exercise the authority, as it has the power, to examine into this matter. This is necessary to the exercise of its legitimate jurisdiction. *Cum quid conceditur; conceditur et id per quod pervenitur ad illud.*

The Court of Probates, in our opinion, therefore, ought to have overruled the plea or exception to its jurisdiction. This error renders it necessary that the case should be remanded for the action of that tribunal, on the matter alleged in the supplemental petition.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed, the plea to the jurisdiction overruled, and the case remanded for further proceedings, according to law; the appellee paying the costs of this appeal.

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HIS CREDITORS.

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CHARLES JANIN vs. HIS CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The hypothecary as well as the chirographery creditors, constitute a part of the aggregate amount of the passive debts of an insolvent, and all together, form the mass; a majority of three-fourths, in number and amount of which, is necessary to grant a forced respite.

Creditors having a privilege or special mortgage on property of the insolvent, cannot be deprived of their right of seizure, by a forced respite; but if this property is insufficient, they are restrained by the respite from proceeding against any other, for the balance unpaid.

The insolvent debtor cannot avail himself of an error in the notice to his creditors, and have their proceedings set aside, on the ground that, through mistake, he convened them on too early a day.

This suit commenced by an application for a respite. The hypothecary creditors refused, and a sufficient number not voting for it, the meeting proceeded as in a voluntary surrender.

The pleadings, facts and evidence of the case, are correctly stated in the opinion and judgment of the district judge who tried the cause.

On the 18th February, 1835, C. Janin filed his *bilan*, and prayed for an order convoking his creditors. The order was made to convoke them after the usual and legal notices. The insolvent did not, in his schedule, insert the residence

EASTERN DIST. of his creditors. The meeting was advertised for 4th June, 1835. JANIN <sup>1835.</sup> March, 1835, upon ten days' notice. It appears there was but one creditor out of the state, and he was stated to be represented by I. T. Preston.  
HIS CREDITORS.

Norbert Fortier, a creditor, gave a power of attorney to C. Derbigny, to represent him, and to do all he judged best for his interest; and, specially, to vote for Joseph Le Carpentier, as syndic.

G. Derbigny appeared, voted for the respite, and further declared, that, in case the said C. Janin did not obtain the respite prayed for by him, he solemnly protests against all the proceedings held in the matter, upon the ground, that the usual delay fixed by law for the publications, was not allowed, and that his client, who resides out of this parish, must not be considered as having been regularly and legally notified.

The insolvent himself protested against his own proceedings, on the ground, that he had been misinformed as to Mr. Preston's powers in relation to the claim or debt of David Henry, the absent creditor.

This objection is renewed by two other creditors, in an opposition filed on 11th April, 1835, the day fixed on for the trial of the opposition of Charles Janin, which was to the same effect.

I consider all this opposition as coming from the insolvent himself.

These oppositions do not appear to me sufficient to affect the regularity of the proceedings.

Fortier cannot appear for one purpose and not for another: he appeared and voted for the respite, and this appearance waives citation. The order in the power of attorney, to vote for Le Carpentier, contemplates a surrender, and the attorney in fact does not follow this order. But his appearing and voting, waives all objections, and he cannot act the double part of taking part in the proceedings, if they were according to his wish, and opposing them if they were not.

As to the appearance of D. Henry: Preston was his attorney to collect the debt. He did nothing more at the

meeting than an attorney appointed by the court could have done. I am of opinion that his authority, as attorney at law, warranted him in doing what he did. An attorney at law is a special attorney in fact, and may do every thing which may tend to accomplish the object entrusted to him.

I am of opinion that mortgage creditors have a right to appear and vote at a respite, and are to be counted among the creditors for all purposes.

The oppositions of the insolvent and opposing creditors, were overruled; the proceedings homologated and Joseph Le Carpentier declared to be duly appointed syndic. The insolvent and opposing creditors appealed.

*C. Janin, in propriâ personâ, and Labarre, for opposing creditors and appellants.*

1. A meeting of creditors is to be called at thirty days, if there are some of them residing out of the parish. *Louisiana Code, article 3054.*

2. Absent creditors, who are not domiciliated in the state, are to be represented at the meeting by an attorney appointed by the judge. *Louisiana Code, article 3055.*

3. A creditor who does not make oath before the notary holding the meeting, that the sum which he claims is due, shall not have the right of voting, and his credit or vote shall not be counted among those by which it is to be determined, whether the respite is granted or not. *Louisiana Code, article 3054.*

4. A respite is for the exclusive interest of ordinary creditors. Those who have a special mortgage, and some others whose debt is privileged, have no interest in that contract. Their names and claims ought not to be counted among those by which it is to be determined, whether the respite is granted or not. *Louisiana Code, articles 3051, 3052, 3062.*

It is a general rule, that the authority of the attorney at law terminates with the judgment in the suit for which he was employed. *Dangerfield's executrix vs. Thruston's heirs, 8 Martin, N. S., 234.*

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TO  
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*Morphy and Grailhe*, for the appellees.

When an insolvent prays for a respite which is refused by the creditors, they have the right of proceeding immediately, as if it were a cession, and of voting for syndics and directing the terms upon which the property is to be sold. *Louisiana Code, article 3065.* 3 *Louisiana Reports*, 39.

2. Three-fourths, in number and amount of the *creditors on the bilan*, are necessary to a forced respite. *Louisiana Code, article 3050.* 3 *Martin, N. S.*, 506.

3. Privileged and mortgage creditors have an equal right with the others of voting for syndics in a cession, or against the time prayed for in a respite. *Enet vs. his creditors*, 4 *Martin*, 401, 599. *Louisiana Code, article 3062.*

4. The judge may order a meeting of the creditors to be held in ten days from the time of making such order, if the creditors residing in this state, but out of the parish where the meeting is to be held, are represented in said parish. 2 *Moreau's Digest*, page 440, section 11.

5. That the creditors residing out of the state are not in any case to be summoned to the meeting, and that the delay of *thirty* days is provided for the benefit of creditors domiciliated in the state, but out of the parish, where the meeting is to be held. *Louisiana Code, 3054, 3055.*

6. Every opposition to the homologation of deliberations of creditors, must be made within ten days from the filing of the *procès verbal* and must be tried on the reasons expressly set forth in the same. *Louisiana Code, article 3059.*

7. The formalities prescribed by law for obtaining a respite, being imposed on the insolvent who prays for it, he cannot take advantage of any omission or informality in the proceedings, when the creditors refuse the respite, and compel him to a cession nor can any such omission or informality invalidate the whole proceedings. *Louisiana Code, article 3054.*

*Martin, J.*, delivered the opinion of the court.

In this case, the insolvent debtor presented his petition and *bilan*, or schedule, praying for a respite, and that his creditors

be convened for that purpose. The respite was refused and the proceedings were, according to law, changed into a *cessio bonorum*. Syndics were appointed by the creditors, which was opposed by two creditors and the insolvent debtor himself. The appellants contended that the respite was accorded to the insolvent, and consequently the proceedings of the creditors, as in case of a cession, were irregularly and illegally carried on against him. The district judge decided against the pretensions of the opponents, and they appealed.

The insolvent debtor relies, in order to establish the grant of the respite by his creditors in the first instance, on the rejection of the claims of his creditors in fixing the aggregate amount of his passive debts, in order to ascertain the legal majority which must concur in granting the respite. It is admitted, that if the claims of the hypothecary creditors are not to be regarded, there was a legal majority in favor of the respite : so that the only question before the court is, whether the hypothecary debts constitute a part of the aggregate amount of the passive debts of an insolvent who asks a respite, in order to ascertain the required majority.

The insolvent contends, that as the hypothecary creditors were not prevented by the respite from proceeding on their mortgages and obtaining an order of seizure and sale against the mortgaged property of the debtor, they are without interest to oppose the respite. In support of this proposition, he has invoked the opinions of several eminent French jurists.

On this point, the court has no difficulty in coming to a decision. We have textual provisions of law, which we are not at liberty to disregard, and which establish the reverse of the proposition contended for. The Louisiana Code, article 3053 requires the votes of three-fourths of the creditors in number and amount, to grant a forced respite, which takes place when the creditors "*do not all agree.*" And under the word *creditors*, in the Code, hypothecary and chirographery creditors are certainly included.

The article 3062, provides that privileged creditors and those who have a special mortgage, cannot be deprived of the right of seizure by a respite ; but if the property on which

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The hypothecary as well as the chirographery creditors, constitute a part of the aggregate amount of the passive debts of an insolvent, and all together, form the mass ; a majority of three-fourths in number and amount of which, is necessary to grant a forced respite.

Creditors having a privilege or special mortgage on property of the insolvent, cannot be deprived of their right of seizure by a forced respite ; but if this property is insufficient, they

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are restrained by  
the respite from  
proceeding a-  
gainst any other  
for the balance  
unpaid.

The insolvent  
debtor cannot a-  
vail himself of  
an error in the  
notice to his cre-  
ditors, and have  
their proceed-  
ings set aside on  
the ground, that  
through mistake  
he convened  
them on too ear-  
ly a day.

they have this privilege or mortgage, is insufficient to pay the whole of their claims, they shall be restrained from proceeding against the surplus, by the terms of the respite.

It is, therefore, not correct to say that a respite does not affect these creditors.

The insolvent has further urged, that the meeting of his creditors was irregularly called on a notice of *ten* days, on account of his being mistaken as to one of his creditors who resided out of the state, being represented therein. To this it has been victoriously replied, that he cannot avail himself of any irregularity which was the result of his own error or mistake in requesting that his creditors be convened on too early a day.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

## M'DONOUGH vs. GOULE &amp; LAMBERT.

## APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In a suit against the endorsers of a promissory note, given for the price of sugar sold by them as agents of the owner, and they show they were not bound to warrant the solvency of the purchaser, that the note was drawn to their order, and endorsed in blank in the absence of the owner of the sugar, who took it in settlement and the plaintiff is proved to be his agent: *Held*, that the defendants are not liable under their endorsement.

When the plaintiff's right to sue, as the *bonâ fide* holder of an endorsed note is contested, and it is shown he became possessed of it as agent, and not in the usual course of trade, the endorsers may show that they endorsed it for the principle only as agents, and without ultimate responsibility.

This is an action against the defendants, as endorsers of a promissory note drawn by Tourné & Beckwith, to their order

and endorsed in blank, for the sum of one thousand five hundred and two dollars and protested for non-payment. EASTERN DIST.  
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The defendants admit their endorsement on the back of the note, and aver the plaintiff is not the owner, but that the same is the property of André Durnford, who took it from them without warranty, for the proceeds of a quantity of sugar, which they, as his agents, sold on his account. That the note was drawn to their order, and endorsed by them in blank, because the said Durnford was absent at the time it was executed, and on his return took it from them without warranty, all of which was known to the plaintiff, to whom it was given for collection in his name. They aver, they are not in any manner responsible, and pray to be dismissed.

The defendants proved by their book-keeper, that they were the agents of André Durnford for the sale of his sugar; that they sold the crop of 1833 to Tourné & Beckwith, for two notes including the one in suit, without guarantee; that no guarantee commission was charged to Durnford; that the plaintiff is the agent of Durnford, and had this note protested for non-payment.

The district judge was of opinion, the defendant proved the property of the note was in Durnford, and that the plaintiff was his agent; that the defendants were not liable, because they did not guaranty the sale of the sugar for which the note in question was taken and delivered to Durnford on settlement, without guarantee. Judgment was rendered in favor of the defendants, from which the plaintiff appealed.

*Gray*, for the plaintiff and appellant.

*Canon*, *contra*.

*Bullard, J.*, delivered the opinion of the court.

The appellant seeks the reversal of a judgment pronounced against him, as holder and endorsee of a promissory note in an action against the endorsers.

The defence relied on by the endorsers was: first, the want of due notice of protest; and secondly, that the

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In a suit against the endorsers of a promissory note, given for the price of sugar sold by them, as agents of the owner, and they show they were not bound to

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**EASTERN DIST.** plaintiff is not the owner of the note, but that it belongs to one André Durnford; that both the plaintiff and Durnford know, that the defendants are not liable to pay the note as endorsers, because it was taken by them in payment of a part of the sugar crop of Durnford, sold by them as his agents

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warrant the solvency of the purchaser, that the note was drawn to their order and endorsed in blank in the absence of the owner of the sugar, who took it in settlement, and the plaintiff is proved to be his agent: *Held*, that the defendants are not liable under their endorsement.

When the plaintiff's right to sue as the *bonâ fide* holder of an endorsed note is contested and it is shown he became possessed of it as agent, and not in the usual course of trade, the endorsers may show that they endorsed it for the principal only as agents, and without ultimate responsibility. We think the proof sufficient to identify the plaintiff with Durnford, his principal, and to authorise the endorsers to show, they endorsed only as agents, and without ultimate responsibility. The evidence on this point satisfied the court of the first instance, that the defendants are not liable as endorsers, and we concur in that conclusion.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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MARIE LOUISE, f. w. c. vs. MAROT ET AL.

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MARIE LOUISE,  
f. w. c.  
vs.  
MAROT ET AL.

## APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the evidence does not legally authorise the verdict of the jury, although it may have in reality been based on the intentions of the parties, it will be set aside, and the cause remanded for a new trial.

In every thing relating to the contract of donation, the acceptor of the donee, who is a minor, is *functus officio*, when he has accepted; and no written or explanatory act, made by him afterwards, will have any effect, in relation to the right of the donee.

The Supreme Court will exercise the general power granted by law, and remand a cause for a trial *de novo*, when in its opinion justice requires it.

It is a general rule in remanding a cause, that the court should be influenced alone by the pleadings, documents and evidence in the record; but in an action claiming the release of a person from slavery to liberty, every thing which may properly be done in *favorem libertatis* should be done, even to notice facts *de hors* the record.

This is an action by the plaintiff, claiming the emancipation of her daughter, a mulattress aged twenty years, *a statu libera*.

The petitioner alleges, that her daughter, Josephine, while a slave, belonging to Jean Mornay, was by him made a donation to Marie Susette Emelie Marot, the minor daughter of Toussaint Marot, who accepted the donation for his child, and was bound to emancipate Josephine, when she arrived at the age of twenty years. She alleges that the donee, who is now the wife of Lalande Ferriere, and her husband, have imprisoned Josephine, and refuse to emancipate her: she prays that a decree be rendered, requiring Ferriere and wife to have her said daughter emancipated as soon as possible, and that she be forthwith released from imprisonment.

The defendants aver, that Josephine was given to one of them while a minor, on condition that she was to remain a slave until she was thirty years of age, when she was to be emancipated. They further aver, that they are entitled to

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her services until that period, and had a right to arrest and imprison her as a runaway.

The testimony shows that Jean Mornay made a donation of Josephine, when about two years of age, to the minor daughter of Toussaint Marot, then about the same age, by public act dated the 26th February, 1816, on condition that she should be emancipated at the age of thirty years; the father signing the act and accepting the donation for his daughter.

On the first of March following, Marot, the father of the donee, executed a private act before two witnesses, in which he declares it was the intention of the donor, that Josephine should be emancipated, as soon as she was twenty years of age. These are his words used in the declaratory act : "Je ne me suis obligé pour ma fille qu'affranchir conformément aux lois de cet Etat, ladite Joséphine que lorsqu'elle aura trente ans ; néanmoins la vérité est que l'intention du donateur est que ladite Joséphine soit affranchie aussitôt qu'elle aura vingt ans. En conséquence j'oblige ma dite fille par la présente à se conformer aux désirs de son grand père en considérant ladite Joséphine libre dès qu'elle aura vingt ans," etc.

These two acts were given in evidence to the jury. The defendants' counsel objected to the reading of the second one, on the ground that it was not binding on the defendant and donee of the slave, as her title was complete, by the public act passed before this one, and that no act of her father could divest her of her lawful right, without the formalities of law. The judge overruled the objection, and admitted the paper as part of the *res gesta*; and also to show that the intention of the donor was, that Josephine should be free as soon as the law would allow. The decision of the court was excepted to.

The judge charged the jury, that if they were of opinion, it was the intention of the donor, that Josephine should obtain her freedom when she came of age, and the law would allow it, they should find for the plaintiff; but if they believed the donor did not intend that she should be set free until she was thirty years of age, they ought to find a verdict

for the defendants; and also that the law was in favor of liberty, and if there was any reasonable doubt about the intention of the donor, as expressed in the act of donation, that doubt should be construed in favor of the plaintiff. The charge was excepted to by the defendants' counsel

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The jury returned a verdict for the plaintiff, and judgment was rendered thereon, that Josephine be set free, provided, the consent of the civil authorities can be obtained, and that she remain in the service of the defendants until then, &c.

The defendants appealed.

*Canon*, for the plaintiff, contended, that the established rule in expounding contracts is, that greater force is to be given to the intentions of the parties, than to the mere words in which the contract is expressed. *Law 219, de verb. sign. Domat, liv. 1, title 1, section 2, article 13. Louisiana Code, 1940.*

2. The intentions of the parties in this case, it is clear, were, that Josephine should be emancipated when she became of age. This is expressed in the declaratory act of the father, who accepted the donation for his minor daughter.

3. The contract of donation is gratuitous: "*un contrat de bienfaisance;*" and a gift should be received with gratitude. The intentions should govern in all contracts, and may be proved by circumstances *de hors* the instrument; and with greater force should they prevail in a contract of donation.

The judgment should be amended in favor of the plaintiff, so that Josephine be permitted to stay with her mother until she be emancipated.

*J. Seghers, contra.*

1. The charge of the judge to the jury was clearly erroneous, as the authentic act is positive and binding in this case.

2. The donation being made to a minor, and accepted by her father as tutor, by notarial act, duly recorded, the right of ownership of the donee, became absolute; and no act of the father, either as tutor or relative, could divest her right

**EASTERN DIST.** thus acquired. *Civil Code, page 220, ante 52, 57. Ibid., June, 1835.* *page 222, articles 62, 63.*

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*Mathews, J.*, delivered the opinion of the court.

In this case the immediate emancipation of a mulatto girl about twenty years old, *a statu libera*, is claimed from the defendants, who hold her in slavery. The cause was submitted to a jury in the court below, who found a verdict in favor of the plaintiff, and judgment being thereon rendered, the defendants appealed.

The claim of immediate liberty on the part of the mulattress, in the present instance, is based on two acts introduced in evidence in support of the action: on a donation made in due form of law, by J. Mornay, the owner of the girl, on the 26th February, 1816, to the defendant M. S. E. Marot, who was then a minor, and accepted by the agency of her father. This donation was made on the express condition that the donee should liberate the slave when she should attain the age of thirty years. Some days after this act, on the 11th of March of the same year, the father, who had assisted his minor child in its acceptance, made a declaration in writing, in a private act, attested by the two witnesses who had signed the notarial act of donation, stating that the intention of the parties to that deed was, that the slave given should be liberated at the age of twenty years, and not thirty, as expressed in the donation. These acts were given in evidence to the jury, and from the verdict which they found, it would seem that more credit was given by them to the last act, than the first. Their verdict may, in reality, be based on the true intention of the parties; but the evidence did not, in our opinion, legally authorise them to come to this conclusion.

Where the evidence does not legally authorise the verdict of the jury, although it may have in reality been based on the intentions of the parties, it will be set aside and the cause remanded for a new trial.

In every thing relating to the contract of donation, the acceptor of the donee, who is a minor, is *functus officio*, when he has accepted the contract of donation, the acceptor, on her part, was *functus*.

*oficio*, and by himself could do no acts prejudicial to her interest. It is really painful, in applying rules of law to a case, to be obliged to violate sentiments and feelings of humanity: but this pain is sometimes felt by judges in the settlement of conflicting rights between suitors.

Yet, although in the present instance, a sense of duty will not allow us to acquiesce in the verdict and judgment of the court below, we do not consider ourselves bound to leave the wretched victim of present affliction without hope.

The case is peculiar in its nature—a claim for liberty! And, although generally considered, such claims, in a government where slavery is tolerated, ought not to be particularly favored when brought in opposition to the rights of property; yet the facts disclosed in the present instance have convinced us that it is a case in which we ought to exercise the general power granted by law to remand causes for a trial *de novo*, whenever justice, in our opinion, requires such a proceeding. It is, perhaps, true, as a general rule, that the Supreme Court, in the exercise of this power, should be influenced alone by the pleadings, documents, and evidence found in the record; whether these things, as exhibited in the present case, would authorise us to remand, may be doubtful: but it is an action brought to redeem a helpless female from slavery; and every thing which may properly be done in *favorum libertatis*, should be done, even to notice facts *de hors* the record.

It was stated at the bar, and not denied, that the person now claiming her immediate emancipation, was taken by her owners to France, a country whose institutions do not tolerate slavery or involuntary servitude in any manner, and was placed by them under the direction of a hair-dresser, to learn his art. Did she not become free in France? Being brought from a foreign country into the United States, is she not free, according to the provisions of laws enacted by Congress? These are questions which we will not now solve; but we deem it proper to remand the cause, in order that they may be put in a train for solution.

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cepted; and no written or explanatory act, made by him afterwards will have any effect, in relation to the rights of the donee.

The Supreme Court will exercise the general power granted by law, and remand a cause for a trial *de novo*, when in its opinion justice requires it.

It is a general rule in remanding a cause, that the court should be influenced alone by the pleadings, documents and evidence in the record; but in an action claiming the release of a person from slavery to liberty, every thing which may properly be done in *favorum libertatis*, should be done, even to notice facts *de hors* the record.

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June, 1835. It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed; and the verdict of the jury set aside. And it is further ordered, adjudged and decreed, that the cause be remanded to said court, to be tried *de novo*; the appellee to pay the costs of this appeal.

SYNDICS OF  
YARD & BLOIS  
vs.  
MECHANICS' AND  
TRADERS' BANK.

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SYNDICS OF YARD & BLOIS vs. MECHANICS' AND TRADERS'  
BANK.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

An act of pledge of bank stock, to secure the payment of a specified note to the bank, and "for the payment of any other note or obligation which may be due, or which may become due to said bank, by the pledgors," will not be construed to extend to notes drawn to the order of another person, and held by the bank, although one of them was due, and protested at the time the pledge was given, but not mentioned in it.

As regards the creditors of the pledgor, an act of pledge is not valid, beyond the amount of the notes or debts specifically mentioned in the act.

The syndics of Yard & Blois instituted suit against the Mechanics' and Traders' Bank, to compel the latter to surrender to them one hundred and fifty shares of stock, which the insolvents had pledged to secure the payment of a note of two thousand five hundred and twenty dollars, which they allege is now paid, and that the defendants refuse to give up the pledge.

The Bank averred, the stock in question was pledged on the 17th April, 1834, to secure a note of two thousand five hundred dollars, by the pledgors, "and any other note or obligation then due, or to become due from Yard & Blois, to

said institution ;" and that it was the *bonâ fide* holder of three promissory notes, for which Yard & Blois, the pledgors, are bound, and for the payment of which the said stock stands pledged : the first of these notes is for one thousand five hundred dollars, drawn by the pledgors to, and endorsed by T. H. Hearsey, payable sixty days after date, which was the 16th January, 1834; another of similar tenor and amount, due and protested the 9th day of April, 1834, and a third, on which the insolvents were endorsers, for six hundred and ninety-four dollars, protested for non-payment the 22d April, 1834. The bank prayed for judgment on all these notes, and that it be paid by privilege out of the proceeds of the pledge of stock.

Upon these pleadings the cause was tried.

There was no proof that the bank was the owner of the notes set up under the pledge, other than the simple allegations in the answer, and possession of the two of one thousand five hundred dollars each, under protest. The act of pledge is dated the 17th April, 1834, after the last two notes were due.

The District Court decreed the delivery of the pledge of the bank stock in contest, to the syndics, within ten days; and in default thereof, that the bank pay to them the sum of six thousand dollars. The bank appealed.

*Carleton and Lockett*, for the plaintiffs.

The act of pledge relied on by the defendants, gave them a privilege only for the amount of the note for which the stock was pledged.

*Sterrett*, for the defendants, contended, that the act of pledge was valid, to all intents and purposes; and the stock pledged, is liable for all the notes due by the insolvents, and held by the defendants.

2. The syndics of an insolvent, do not stand in a better condition than himself, who would be bound, and could not withdraw the pledge until they paid their notes.

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3. The act of pledge expressly declares, that it is given to secure the payment of *any other note or obligation, which may be now due, or become due from the pledgors*, to the bank, as drawers or otherwise.

4. This is not an action in avoidance of the contract of pledge ; the judgment is therefore erroneous.

*Bullard, J.*, delivered the opinion of the court.

The plaintiffs sue as syndics of Yard & Blois, to recover certain certificates of stock belonging to the insolvents, which had been by them deposited in pledge for a loan from the bank, which they allege has been paid, and they pray, that the bank may be condemned to surrender the stock, or pay the value of it.

The defendants answer, that the stock was pledged, not only to secure the payment of the note of the insolvents, for two thousand five hundred and twenty dollars, which it is admitted has been paid, but, further to secure the payment of any other note or obligation then due, or about to become due; and they allege, that Yard & Blois are indebted to them in the amount of two notes drawn by them to the order of T. H. Hearsey, and another note drawn by one Hervey and endorsed by the insolvents, all of which they allege, have been protested, and are due to the bank, and they pray judgment for the amount of said three notes, to be paid by preference and privilege, out of the proceeds of the stock.

An act of  
pledge of bank  
stock to secure  
the payment of a  
specified note to  
the bank, and  
"for the payment  
of any other note  
or obligation  
which may be  
due or become  
due to said bank,  
by the pledgors,"  
will not be con-  
strued to extend  
to notes drawn  
to the order of  
another person,  
and held by the

The act of pledge which is under private signature, but passed before the cashier, sets forth, that "Yard & Blois having obtained a discount from the bank on their note, payable to the president, directors and company, for two thousand five hundred and twenty dollars, dated 17th April, 1834, payable sixty days after date, do pledge one hundred and forty shares of the capital stock of said bank belonging to them, on which forty dollars per share had been paid in, &c., to remain and be held as security for the payment of said promissory note, and for the payment of *any other note or obligation which may be now due or become due from us to*

*said bank*, as drawers or otherwise; and as security for the renewal of any part of said sum which may at any time be obtained by said Yard & Blois, from said bank on other notes."

It is not shown, that the notes drawn to the order of Hearsey were the property of the bank. One of them was due and had been protested at the time the pledge was given, and no mention is made of it in the act of pledge, and it appears to us, it was not in the contemplation of the parties, that the pledge should extend to those notes. The plaintiffs represent all the creditors of Yard & Blois, and as relates to them we are of opinion the pledge is not valid beyond the amount of the note, specifically mentioned in the act, according to articles 3124 and 3125 of the Louisiana Code.

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bank, although one of them was due and protested at the time the pledge was given, but not mentioned in it.

As regards the creditors of the pledgor, an act of pledge is not valid beyond the amount of the notes or debt specifically mentioned in the act.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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**DUNN vs. NEW-ORLEANS BUILDING COMPANY.**

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

When a resolution, adopted by a meeting of the stockholders of a corporation, ratifying certain sales of the corporation property, is produced, the officers of the corporation who urge the invalidity of the ratification, on the ground that the meeting was illegally called, must show such illegality, and support their allegations by proof.

The plaintiff alleges, he purchased two lots of ground at public auction, in the city of New-Orleans, on the 9th of December, 1834; that said lots were the property of the "New-Orleans Building Company," and sold by the authority of the stockholders thereof, on the terms and

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conditions announced by the auctioneer, and published previously thereto ; that the president of said company refuses to execute an act of sale to him, although he has demanded it, and offered to comply with the terms of the adjudication at said sale. He prays that the president and directors of said company be cited, and decreed to execute acts of sale and make him a complete title to said lots, on his complying with the terms of sale.

The defendants deny that the adjudication of the lots in question, was made by authority of the stockholders, or the president and directors of said company ; they aver, that by the sale of all the property of said company at auction, it became insolvent, and unable to give a title, but that the property belonged to its creditors ; that the property was encumbered with mortgages, which the company was unable to raise, and that the plaintiff did not come forward to demand his titles, until a subsequent meeting of the stockholders made a different disposition of the property.

On these pleadings, the parties went to trial. The facts and evidence of the case, material to the points at issue, are as follows :

Some time after the New-Orleans Building Company was organised and had adopted its by-laws and elected its directors, its affairs became embarrassed. On the 13th October, 1834, the directors determined that it was expedient to sell the property of the company and fixed the terms of sale. A meeting of the stockholders was called on the 17th of October, at which it appeared twenty-eight out of eighty-three stockholders were present and approved of the sale and the terms fixed by the directors. On the 1st of December following, the directors made a slight variation in the terms of sale, by altering the instalments. On the 9th of the same month the sale took place, at which the plaintiff purchased the two lots in question, for eight hundred and fifty dollars. On the 18th December a meeting of the stockholders was held, at which a resolution was proposed and adopted, by the majority present and voting, approving

of the proceedings and conduct of the directors, in making the sales in question.

At a subsequent meeting of the stockholders, on the 20th December, 1834, all the directors and officers of the corporation resigned, and a new organization took place.

The plaintiff made application to have his title completed, and an act of sale passed in conformity to the adjudication made to him at the auction sale. The new board of directors refused.

The district judge who presided at the trial, states, in delivering his opinion, "that the case has been brought on and tried in a somewhat loose and irregular manner; and that the matter has received very little investigation of the principles applicable to the mode of conducting business by meetings of stockholders of corporations;" that the case appeared to him in the following light :

1. "That the power of alienating the real property, being reserved to the stockholders of the company, and the terms sanctioned by them, it was not competent for the directors to alter them.

2. "That it does not appear, that the proper and sufficient steps were taken, to convene the stockholders at any time, or to give notice of the subject of deliberation ; that it is manifest, great irregularity in all the proceedings of the directors, and meetings of the stockholders prevailed, &c.

3. "A person buying from a corporation, must look to it, and examine that there is proper authority to sell ; that the question is different, when it is sought to enforce a title from a corporation, from what it would be if a title had been made, and it was sought to annul it."

Judgment was rendered in favor of the defendants, and the plaintiff appealed.

*Carter*, for the plaintiff and appellant.

It is admitted by the plaintiff, that, by the charter of the Building Company, the immoveable property could not be alienated or sold by the directors, without the authorisation

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EASTERN DIST. of the stockholders; but the plaintiff contends that such  
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1. By an agreement entered into by the company, with Laurent Millaudon, Esq., in the early part of 1834, the company, in consideration of a large pecuniary aid rendered by that gentleman, agreed to sell their property on or before the 15th December of the same year, in order that the proceeds of the sale might meet the obligations of Mr. Millaudon, in behalf of the company. It does not appear that at the time of this agreement, which was authorised and ratified by the stockholders, that the terms and conditions of the sale of the property were fixed.

2. That, admitting that the directors changed the terms of sale from those fixed by the stockholders at their meeting, on the 4th November, 1834, yet this does not invalidate the sales. We contend, that all the directors required from the stockholders was, *the authority to sell*; and that the fixing of the terms was in the discretion of the directors; and for which, they could be only held *personally* responsible, in the event of fixing terms, which would result in a loss to the company. It is not pretended that the terms fixed by the directors, proved of injury: on the contrary, they were more favorable to the stockholders, than those fixed by the stockholders.

3. All the stockholders resided in the city of New-Orleans: the terms, as fixed by the directors, were advertised in the public prints for a length of time: a majority of the stockholders attended the sale, and a number made purchases. These acts, we contend, were confirmatory of the terms fixed by the directors.

4. That, at a meeting of the stockholders, holden on the 18th of December, 1834, eight days after the sale at which the plaintiff purchased, it appears a statement of the affairs of the company was presented, showing the result of the sale on the 9th, and the terms on which the property had been sold. At this meeting, and after this statement, a resolution, introduced by Mr. E. Torlee, in the following words, was

passed: "Resolved, That the stockholders of the company do approve of the proceedings of the present directors, to this date, as being made in furtherance of the interests of the company." We contend that this resolution confirmed the sales of the 9th of December, and gave the plaintiff a clear right to exact from the defendants a title to the lots in question. The legality of this meeting has been attacked by the judge, but by an inspection of the record, no proof can be found to justify that attack.

5. In conclusion, the counsel feels bound to notice the following paragraph in the judgment of the court below: "The case has been brought on and tried by consent, in a somewhat loose and irregular manner; and the matter has received very little investigation of the principles applicable to conducting business by meetings of stockholders." The counsel placed upon record all the testimony he thought proper to maintain the case of his client; and if he choose not to enter into legal discussions, upon a point which he believed, not before the court, that was a matter for his discretion, and not a subject to be commented upon by the judge: and the counsel believes that the decision of this tribunal will show that point which the judge below wanted information upon, was not, under the aspect of this case, a matter for investigation.

6. It is a cause of deep regret, that the judge of the court below should so frequently indulge himself in personal attacks upon the conduct of counsel, in the management of their causes. A continuance of such a system, can only tend to interrupt those relations which should exist between the bench and the bar.

*Preston, contra,* contended, that the directors who determined upon the sale of this property, and fixed its terms and conditions, had never been voted for by the stockholders, and consequently had no authority to order the sale, which is null.

2. At the meeting of the stockholders, on the 18th December, 1834, these self-styled directors obtained a vote

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of approbation of their proceedings, from only ten out of about eighty stockholders, the whole number. It is not shown, nor does it appear, that they passed any order calling this meeting, but on the contrary, there was an order of the stockholders themselves, to hold an adjourned meeting, not on the 18th, but the 20th December.

3. The plaintiff purchased from persons having no authority to sell, and if he has suffered any damage, he must look to those with whom he dealt.

*Martin, J.*, delivered the opinion of the court.

The plaintiff was purchaser of two lots of ground in the city of New-Orleans, which were sold at public auction by order of the directors of the New-Orleans Building Company. He claims to have a complete legal title made to him in pursuance of the adjudication at the sale. The defendants refused this; and on his suit to compel them, judgment was rendered against him, rejecting his claim, from which he has appealed to this court.

The counsel for the plaintiff admits that the sale was made by order of the directors of said Building Company, on different terms than those which had been proposed and agreed upon by a meeting of the stockholders, who authorised the directors in the first instance to sell; but, he has shown, that after the adjudication, the conduct of the directors and their acts in relation thereto, was approved, and the sale confirmed.

The district judge who tried the cause determined, that the last meeting of the stockholders at which it is alleged the sale in question was confirmed, was not regularly called according to the solemnities and forms prescribed by law, and necessary for the call of such a meeting; and that a meeting of the stockholders thus called and held, could not authorise the alienation of the property of the company.

When a resolution, adopted by a meeting of the stockholders of a corporation, ratifying certain sales of the corporation property is produced, the officers of the corporation who urge the invalidity of the ratification, on the ground that the meeting was illegally called, must show such illegality and support their allegations by proof.

We have looked in vain in the record, for any evidence in support of the decision of the judge *a quo*, or the conclusions to which he came in deciding the case. When a resolution adopted at a meeting of the stockholders of the corporation,

ratifying a sale made by the directors, of certain property belonging to it, is produced, the officers of that corporation who urge the invalidity of the ratification on the ground that the meeting was illegally called, must support their allegations by proof. This has not been done.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and it is ordered, adjudged and decreed, that on the plaintiffs complying with the terms of the auction sale, within thirty days from the day on which the present judgment shall become final, the defendants do execute and convey a good and legal title to the plaintiff, for the two lots of ground described in the petition; and that the defendants and appellees pay costs in both courts.

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**SHANE & WITHERS vs. WITHERS'S LEGATEES.**

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

As a general rule in all testamentary dispositions of property, or dispositions *causa mortis*, the words *estate* and *succession* are to be taken and construed as synonymous.

Where a testator wills to his wife and two sisters, each *one third part of his whole estate*, having no forced heirs, they will be considered as universal legatees, succeeding to the whole of the estate of which he died possessed, to the exclusion of all others.

Universal legatees having the seizin of the estate under the will, hold the place of heirs instituted by testament.

This is an action by five of the sisters and heirs at law of the late William Carr Withers, against his widow and two other sisters, whom he instituted his heirs and universal

**EASTERN DIST.** legatees under his will, to the exclusion of all his other relations; in which they claim a division in equal proportions, of all their brother's estate which was *acquired* between the date of the will and the death of the testator; and, also, to annul a donation *inter vivos* of a valuable lot of ground to Sarah Ann Withers, his sister, and one of the defendants, by her said brother, on the ground that she was a minor, and incapable of accepting the donation without the assistance of a curator; and that it makes no estimate of the value of the lot, but contains conditions and reservations contrary to law.

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The defendants answered separately, and pleaded a general denial, and claimed the whole of the estate and property of which the testator died possessed, under the will.

The validity of the donation which is attacked in this suit, was determined and settled in favor of the donees, before the decision of this case and abandoned. See 6 *Louisiana Reports*, 231.

This case depends mainly for solution on the interpretation of the will of the deceased. The following extracts from the opinion of the District Court, contain the material facts of the case.

**In 1823 W. C. Withers made his will in the following terms:**

"New-Orleans, July the 16th, 1823, I, W. C. Withers,  
of the city of New-Orleans, do make this my olographic  
will, as follows, to wit: I do bequeath to my wife, Margaret  
Delia Withers, one-third part of my whole estate; I also  
bequeath to my sister Sarah Ann Withers, one-third part, I  
also bequeath to my sister Margaret Withers, one-third part of  
my whole estate; and finally I do, by these presents, appoint  
my wife Margaret Delia Withers, and Martin Gordon, and  
Thomas S. Kennedy, my executors; and they are hereby  
empowered and authorised to make an inventory, and to take  
full possession of all my estate, without the intervention of  
any court of judicature in this or any other state in the Union."

(Signed,) W. C. WITHERS.

Beside the two sisters named legatees in the will, W. C. Withers left five other sisters, who are the plaintiffs in this suit.

Withers died in 1829, and the question raised is, whether the legatees named in the will, take all the property of which Withers died possessed in 1829, or only the property of which he was possessed on the 16th July, 1823.

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The supposed difficulty in this case is considered to arise mainly out of the following articles of the Code, on the subject of donations and testaments. "Article 1713: a disposition, couched in terms present and past, does not extend to that which comes afterwards: for example, a legacy of all the books a testator possesses, does not include those which he has purchased since the date of his testament."

"Article 1714: a disposition couched in the future tense, refers to the time of the death of the testator: thus, a legacy of all the furniture there shall be in the house of the testator, includes that which he has purchased since the date of the testament, as well as the rest."

"Article 1715: a disposition, the terms of which express no time, either past or future, refers to the time of making the will; thus, when a testator expresses simply, that he bequeaths his plate to such a one, the plate that he possessed at the date of the will, is only included."

These rules are sound, because they have a direct tendency to establish the intention of the testator, but they are not supposed to have any special application to this case.

The counsel for plaintiff has urged that these rules are to be applied with rigor in the construction of all legacies, because they are placed in a section under the head of general rules for the interpretation of legacies; but this is not conclusive, and scarcely plausible reasoning. The general rules contained in that section are to be applied to legacies, according to their respective natures and qualities, whether general or special, on an universal or particular title: *reddendo singula singulis*. Some of those rules apply exclusively to legacies on a particular title, and those pressed on the attention of the court, seem to be more particularly of that character.

The counsel of both parties refer, in a great measure, to the same authorities, which proves that a just settlement of

EASTERN DIST. the case depends on sound distinctions; almost all the cases  
June, 1835. which plaintiffs' counsel bring in support of the position taken  
SHANE & WITH- by them, are cases of specific legacies of moveables.

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admits of increase or diminution, during the life of the  
testator.

Upon any other construction a singular anomaly might exist. In 1823, Withers might have owned two hundred thousand dollars in land, slaves, money, &c., over and above his debts: before 1829 he might have exchanged, sold, &c., and bought other property, and not to be worth more than two hundred thousand dollars; but the defendants would not have been entitled to a greater share than relations of equal propinquity: such, clearly, was not the intention of the testator.

The word estate is used in many articles of our Code, when speaking in relation to a person deceased, as equivalent to succession. Had the testator used this word, there could not have been the slightest doubt. The testator used the word in relation to his own decease, and I think it equivalent to succession. It is clearly so in the last place, where it is used where he directs his executors to make inventory and take possession of all his estate, without the intervention of any court, &c. Unless the sense require it, it is usual to construe the same word in the same sense, when it occurs several times in the same instrument.

The form of expression used in this will, clearly amounts to an institution of heir, and is such in substance. He institutes his wife and two sisters, his heirs, each for a third of his estate or succession.

Judgment was rendered for the defendants. The plaintiffs appealed.

*Crawford*; for the plaintiffs, made the following points:

1. That the dispositions contained in the testator's will, express no time, neither past nor future, and should have

been construed as referring to the time of making said will, according to the *Louisiana Code, article 1715.*

2. That it was not in the power of the testator to pass the estate acquired or accumulated, since the date of the will, without some expression therein, showing such intention.

3. That the testator had no such intention of disposing of his future property acquired or accumulated, since the date of his will, is evident from his omission to do so, and the great change in his affairs, and the great length of time, between the date of his will in 1823, until his death in 1829.

4. That the will does not convey to the appellees the property acquired since its date, there being nothing to give it a future operation.

5. That the will should have been construed as a species of conveyance, subject to the same legal construction of ordinary conveyances.

That the District Court should have decided in favor of the appellants, for their proportionable parts of the testator's estate, acquired since the date of the will.

*Eustis, Preston and Conrad,* for the defendants.

1. From the *terms* of the will it is evident, that the testator did not intend to die intestate as to any portion of his *estate*.

2. This construction is fortified by the relations which existed up to the time of the decease of the testator, between him and the defendants. See *testators of Burthe.*

3. The article 1715 of the Civil Code applies to *particular legacies* only.

4. The intention of the testator must always govern in the construction of wills, where the terms admit of doubt.

*Hennen,* for the plaintiffs, in reply.

1. The only question, is that arising out of the interpretation of the will of the testator: Is the rule of the *Louisiana Code, article 1715,* to be applied in this case? The plaintiffs maintain that it is the only rule, and urge for it the following considerations:

Testamentary dispositions of whatsoever kind, are to have their effect according to the rules established in this *Code,*

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**EASTERN DIST.** *article 1598.* No other rules of any other system of jurisprudence are to be invoked; the rules here stated, are considered as sufficient and must apply in all cases. However hard or arbitrary they may appear in particular instances, the courts must be bound by them, for such is the positive enactment of the legislature.

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2. *The defendants claim under the will as legatees*, and must be bound by the rules of law applicable to legacies. If it is doubtful whether a greater or less quantity has been bequeathed, it must be decided for the least, *article 1710*. And in pursuance of the same principle, it is also a rule, that where the testator speaks not of his property, in reference to the past or the future, it shall be considered that he disposes only of the property owned by him at the time of making his will, *article 1715*. This would appear indeed, to be only a deduction from the rule of the article 1710. Now, this rule of article 1710 will be admitted, I presume, to apply to all legacies; if so, why not the rule of article 1715 likewise? What reason can be given therefor? The defendants say, that it must apply only to particular legacies.

3. But where do they find any ground for this limitation? They have produced no authorities for it from the Code; nor any Spanish writer. It is not recognised in the Roman or the French law. See *Merlin's Rep. verbo "Legs."*, section 4, No. 17.

4. But if the rule is established by the Louisiana Code, then is it binding on the court, and we can go no further. To the code only the plaintiffs refer, and I consider the rule as established there conclusively; and by it, they consider the judgment of this court should be in their favor.

The intentions of the testator, if critically examined, will appear, on mature reflection, to support this rule of interpretation, which the plaintiffs invoke.

*Mathews, J.*, delivered the opinion of the court.

In this case the plaintiffs sue as heirs of their brother, to recover a portion of his estate or succession, now in the

possession of the defendants, and by them claimed as universal legatees, in equal portions.

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Judgment was rendered in the court below, for the latter, from which the former appealed.

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The decision of the cause depends on the interpretation of an olographic will, made by W. C. Withers, bearing date the 14th of July, 1823, in which he bequeathed to his wife one-third part of his whole estate, to his sister Sarah Ann one-third, and to his sister Margaret one-third, &c., and appointed his wife, Margaret Delia, Martin Gordon and Thomas Kennedy, his testamentary executors, authorising them to make an inventory, and take possession of all his estate, without the intervention of any court of judicature, &c.

All the plaintiffs and two of the defendants, stood in the same degree of relationship to the testator. He lived about six years after the date of his will, and during that period increased considerably his fortune or estate, and the plaintiffs claim to partake of this increase, and share the property thus acquired by their brother, with their sisters Sarah Ann and Margaret, as co-heirs, &c.

The testator having no forced heirs, had a right to dispose by will, of all his estate or succession, and the question is, whether by the testament, as above stated, he intended to give his entire estate to the persons then designated, to take the whole in equal portions. Did he intend to give all the property constituting his succession at the time of his death, or only that which he had at the date of his will?

The fundamental rule in the interpretation of testaments, requires a process of reasoning, by which the intention of a testator may be discovered, whenever his will is expressed in doubtful and ambiguous terms, containing dispositions of uncertain import. To this rule all others established by law, should be made subservient. The cases of uncertainty in all written instruments are various, besides the obscurity appertaining to language, from the different meanings in which the same words may be used, doubts may arise in relation to time or quantity. The will now under consideration, if it be not so plainly expressed as to preclude every

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species of construction, is subject to interpretation, only as it regards the amount of property disposed of by the testator, and the time at which that amount is to be estimated. In truth a doubt as to the quantity given to the legatees, could not possibly arise in any other way, than in relation to the time at which the estimate is to be made.

The testator explicitly disposes of the whole of his estate to three persons, who are appointed to take by equal portions. The whole passed into the hands of his executors, by the terms of the will. In administering, they were clearly bound to collect all his property, and after the payment of debts, to distribute the remainder according to the provisions of the testament. It might perhaps be correctly assumed, that in all dispositions *causa mortis*, the words estate and succession are synonymous. However this may be, generally speaking, it cannot be doubted, according to the seizin granted to the executors in the present instance, that the word estate was used as an expression of the same sense and meaning, which would follow from the term succession. Viewed in this light, it would seem to require great acuteness and ingenuity, to raise a doubt as to the real intention of the testator, were it not for some rules found in our code, relating to the interpretation of legacies.

Where a testator wills to his wife and two sisters, each *one-third part of his whole estate*; having no forced heirs, they will be considered as universal legatees, succeeding to the whole of the estate of which he died possessed, to the exclusion of all others.

Before considering these rules, it is proper to ascertain the relation in which the defendants stand, to the estate or succession of the deceased. Believing as we do, that he did not intend to die intestate, as to any part of his succession, his legatees must be considered as having succeeded to the whole, according to the definition given by the code, of universal legacies. Article 1599 of the Louisiana Code, declares an universal legacy to be a testamentary disposition, by which the testator gives to one or several persons, the whole of the property which he leaves at his decease. The articles immediately following, provide for cases when a testator leaves forced heirs, and are not applicable to the present, except the article 1602, which gives seizin of right to universal legatees, when there are no forced heirs. A sound interpretation of these articles of the

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code, leads fairly to the conclusion, that universal legatees, situated like the defendants, hold the place of heirs instituted by testament.

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Viewed in this manner, the rules for the interpretation of legacies, are wholly inapplicable to the present case. Indeed, from the examples given to illustrate them, it would appear, that they must find their application exclusively to special legacies, or dispositions made by a testator, of some determined portion of his estate, designated in *genus* or *species*.

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Universal legatees having the seizin of the estate under the will, hold the place of heirs instituted by testament.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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### LAFON vs. WHITE ET AL.

#### APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a testator, having two daughters, bequeaths one-fifth of all his property to one, and directs the balance to be equally divided between the two heirs instituted under his will, the first will be entitled to three-fifths, and the second to two-fifths of the whole succession. The first is considered as taking an *increased* portion, rather than a legacy for the one-fifth.

Money paid by a purchaser of property from which he is evicted, and which went to pay a debt of the owner, may be considered as benefiting his succession to the second inheritance; and the heir inheriting indirectly, or from the heir of the original ancestor, must refund in proportion as he acquires from that succession.

This is a petitory action, claiming in the alternative, a tract of land or its price, in the possession of the defendant, Maunsel White, and which he purchased from the vendees of the late Joshua Lewis.

The plaintiff claims, as heir of her father, the late Jean Pierre Lafon, one moiety of a tract of land, on the Missis-

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sippi, below New-Orleans, having eighteen and a half arpents front, by forty in depth, which her said father acquired at the sale of B. Lafon's succession, and as universal heir in 1821; that her father died in 1822, having made a will, in which he left all his property to her and her sister, his only heirs. That Joshua Lewis, without having any valid title to this land, sold it in 1828, to B. F. Smith, for five hundred dollars per arpent front, or nine thousand two hundred and fifty dollars, from whom it came through several hands, to the defendant, M. White, who assumed Smith's obligation to Lewis. She prays that White be condemned to pay her the sum of four thousand six hundred and twenty-five dollars, with interest; or that she be declared the owner of an undivided half of said tract of land.

White set up title under his vendors, which was traced to Joshua Lewis, deceased, whose heirs, with the intermediate vendors were cited in warranty. Lewis's heirs pleaded the general issue and prescription, and set up title to the premises, under a sale for taxes, &c.

The evidence shows that in 1826, Joshua Lewis bought all the interests of the heirs of B. Lafon, in the land, at marshal's sale, under an execution and judgment of the United States District Court, rendered in a suit of the United States vs. the heirs of B. Lafon, for eleven hundred dollars. This sale was viewed as a nullity, and the title of J. P. Lafon's heirs declared good to the land. The title of the plaintiff and the portion she received under her father's will, of his succession, is fully set out, in the opinion of the court.

The District Court decreed to the plaintiff, two-fifths of the eighteen and a half arpents of land claimed, but before taking possession required her to pay the two-fifths of eleven hundred dollars to Lewis's heirs, &c. The plaintiff, being dissatisfied with this judgment, appealed.

*L. Janin*, for the plaintiff.

1. The plaintiff claims in the alternative, either the undivided half of a tract of land of eighteen and a half arpents front, and that a partition be ordered, or the price, which the

defendant has agreed to pay for it to his vendor, and which is yet entirely unpaid. In order to avoid the expenses and contingencies of a partition and re-sale, the plaintiff would prefer the price to the land, and contends that she is entitled to this choice. The defendant cannot complain of this, for his voluntary contract with his vendor, who is a party to this suit, is thereby confirmed, and his title perfected. The warrantor cannot be injured by it, for if the defendant is evicted, he (the warrantor) can never loose less than the price his vendee has paid, or agreed to pay, *Civil Code*, 2483; but he may loose more. *Melançon's heirs vs. Duhamel*, 7 *Louisiana Reports*, 290.

Lewis, who sold the plaintiff's land to the defendant, may be compared to a *negotiorum gestor*, whose unauthorised act the principal may ratify, and then it will bind the other contracting party. In several cases a plaintiff has been allowed to claim directly from a succession, the price for which his property has been sold by the representative of the estate, under the belief that it belonged to it. *Donaldson vs. Rust*, 6 *Martin*, 271. *Baillio vs. Wilson*, 8 *Ibid., N. S.*, 345.

2. Notwithstanding Pierre Lafon's testament, by which he instituted his two daughters his only *heirs*, leaving besides one-fifth of his whole property to Jeanne Philippe Lafon, the plaintiff is entitled to one-half, and not two-fifths of the land. For Jeanne Philippe Lafon was for that fifth, a legatee by universal title; such a legacy for a "quote part" does not transfer the title to the immoveables of the estate; it gives to the legatee, an action for the delivery of the legacy, or an hypothecary action, but not an action of revendication. That legacy may be more, or it may be less than one-fifth of the immoveables, or of any particular immoveable of the succession; it may be nothing at all, if the succession is insolvent, but it is, at all events, a legacy of a sum of money, not of a specific and determinate thing. Notwithstanding such a legacy, the title to the land remains, as well as the action of revendication, exclusively in the heirs. Such is the decision of Spanish writers, based on the nature of the legacy.

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*Partidas 5, tit. 5, l. 55, glos. 5 ; 2d and 5th alinea. Hermosille, page 634, No. 17; page 642, No. 43. See also, Delvincourt, vol. 2, page 320.*

3. Thus this matter was understood by Lewis, who, in the suit instituted by him against Jeanne Philippe Lafon, claimed the rescission of the sale, on the ground that the defendant had a legitimate sister in France, who was entitled to one-half of the land; on the same ground was the judgment of the Parish Court rendered. Jeanne Philippe Lafon, in her suit against Smith, to set the sheriff's sale to Lewis aside, claimed one-half of the land, not three-fifths. See *3 Louisiana Reports*, 473.

4. The warrantors rely on a sale under execution by the marshal of the District Court of the United States, which is null and void; for the judgment under which this sale took place was rendered six years after Lafon's death, in a suit to which Lafon was no party, and in which neither he nor his representatives had ever been cited. *4 Louisiana Reports*, 207. *6 Martin, N. S.*, 514. No execution can issue until after service of judgment, *9 Martin, 517, 3 Ibid., N. S., 247*; and notice of seizure must be given. Both were alike impossible under the circumstances of this case.

5. The plaintiff cannot be condemned, as has been done by the District Court, to pay Lewis's heirs two-fifths, or any part of the eleven hundred dollars which Lewis paid to the marshal. He paid, indeed, only eight hundred and twenty dollars. See his receipts for three hundred and fifty dollars, which were returned to him. The judgment under which the sale took place, was a nullity, and can produce no effect against Barthelemy Lafon's heirs. So it was considered by the district judge in the outset of his opinion; towards the end he gives it effect and enforces it against the plaintiff. It is quite sufficient to observe, that no such claim was made, either by the defendant or the warrantors in their answers.

Conrad and Strawbridge for defendant and warrantors.

*Mathews J.*, delivered the opinion of the court.

In this case the plaintiff claims, as heir instituted by the will of her father, J. P. Lafon, to one-half of his succession, an undivided moiety of a tract of land having eighteen and one-half arpents front on the Mississippi, with the ordinary depth of forty. The defendant White, called in warranty the heirs of Lewis, who undertook to support the title under which he holds. A judgment was rendered in the court below, which decreed to the plaintiff two-fifths of the land claimed, allowing time to ascertain by actual measurement the real quantity, &c. No judgment was rendered against the warrantors in favor of the defendant. From this judgment the plaintiff appealed, and complains that it is erroneous in not adjudging to her half of the land in question, and also, in compelling her to refund a portion of the price paid by the ancestor of the warrantors for the whole tract, on an adjudication to him by the marshal, in pursuance of an execution which issued on a judgment rendered by the District Court of the United States, &c.

It appears by the evidence of the case, that the property now in contestation belonged originally to B. Lafon, who by will, instituted his brother, J. P. Lafon, his sole heir, who subsequently died, after having made his will, by which he instituted his two daughters, one the present plaintiff, and the other Jeanne Philippe Lafon, his heirs. To the latter the testator bequeathed one-fifth of all his property, and directed the balance to be equally divided between the two heirs as instituted by the will, and appointed his daughter Jeanne Philippe, executrix, &c.

These dispositions of the testament certainly gave to his heir three-fifths of the whole succession of the deceased, and under them she acquired as certain and clear a right to the one-fifth given as a legacy, as she did to the portion for which she was instituted heir. It is, in truth, rather to be considered in the light of an increased quantity of a portion of his estate, given by the father to one of his children, more than that bequeathed to the other; in other words, it was a *mejora* as known to the Spanish law, and not a simple legacy

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Where a testator, having two daughters, bequeaths one-fifth of all his property to one and directs the balance to be equally divided between the two heirs, instituted under his will, the first will be entitled to three-fifths and the second to two-fifths of the whole succession. The first is considered as taking an *increased* portion, rather than a legacy for the one-fifth.

EASTERN DIST. granted by the testator to a person in whom no rights vested  
June, 1835. as heir.

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How the executrix administered the succession does not appear; it seems however, that no partition ever took place between the heirs in relation to that part of it situated in this country. She assumed to sell the whole land now in dispute to the ancestor of the warrantors; this sale was rescinded and the purchaser subsequently acquired, by judicial sale, all the right and title which she had in it, amounting in our opinion to three-fifths, in which she held the *dominium directum* as heir, whose portion was increased to the amount of one-fifth by the testamentary dispositions of her ascendant.

These considerations we deem sufficient to terminate the dispute relating to the extent of title acquired by the purchase of the rights of the heir Jeanne Philippe Lafon.

The next question has reference to that part of the judgment of the court below, which ordered the plaintiff to refund two-fifths of the price paid by the purchaser at the marshal's sale.

Money paid by a purchaser of property from which he is evicted, and which went to pay a debt of the owner, may be considered as benefiting his succession to the second inheritance; and the heir inheriting indirectly, or from the heir of the original ancestor, must refund in proportion as he acquires from the succession.

This sale was treated as a nullity by that court, and from the evidence in relation to it, we believe the court in this respect acted correctly. But the money actually paid, (about eight hundred dollars) went to pay a debt due by B. Lafon, and may be considered as having benefited his succession to that amount; and as the plaintiff inherits indirectly from him, we see no injustice in compelling her to refund in proportion as she acquires from that succession.

These principles being settled, it only remains to modify the judgment of the court below, according to the wishes and consent of the parties to the suit. The plaintiff claims in the alternative, one-half of the land or half the price for which it sold; and the parties now prefer that judgment should be rendered for the price to be paid by the last purchaser to the plaintiff.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, and by consent of parties, and in pursuance of the justice of the case, it is

ordered, adjudged and decreed, that the plaintiff and appellant do recover two-fifths parts of the price which the defendant White is bound to pay for nine and one-fourth arpents front of land, having the ordinary depth of forty; being the same which he holds under titles derived from the late Joshua Lewis, &c., amounting to the sum of three thousand seven hundred dollars, from which must be deducted two-fifths of eight hundred dollars, leaving the sum of three thousand three hundred and eighty dollars, to be paid according to the terms of the contract of sale, which sum when paid, shall discharge *pro tanto*, the said White from the obligations arising from his contract of purchase, &c. The warrantors to pay the costs of the District Court; those of this court to be borne by the appellant.

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VS,  
MARIGNY.

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**FRERET ET AL. VS. MARIGNY.**

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

An appeal does not lie from an interlocutory judgment of the District Court, making absolute a rule taken on the appellant, to show cause why the deliberations of a family meeting, convoked under the authority of the District Court, should not be homologated. Such judgment does not work an irreparable injury.

This is an action to rescind the sale of certain immoveable property.

On the 10th June, 1822, Rosalie Picou, widow of George Deslonde, sold a tract of land in the parish of St. Bernard, to Richards Richardson, for twenty-five thousand six hundred and sixty dollars, payable in four annual instalments of six thousand four hundred and fifteen dollars each, reserving mortgage. Richardson sold off part of the land, and the

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EASTERN DIST. price of the portion so sold off, was received by Rosalie  
June, 1835. Picou, in part payment of what was due to her by  
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RICHARDSON.

On the 4th March, 1825, there remained due to Rosalie Picou, on her sale to Richardson, twenty-two thousand five hundred and ten dollars of the capital, beside interest.

Richardson was sued by Rosalie Picou, and being unable to pay, a transaction was made between them, by which the sale was rescinded.

In the interval between the sale to Richardson, and the rescission of that sale, viz: on or about the 4th July, 1822, Richardson's wife died, leaving several children heirs, and out of this circumstance the present difficulty and suit arises; the property being purchased during marriage, was community property, and the heirs of Mrs. Richardson not being parties in any manner to the suit of Picou *vs.* Richardson, nor to the transaction, it is considered that there is a latent title in them, and the object of the present suit is to extinguish that title.

Rosalie Picou, widow Deslonde, on the 21st December, 1827, sold to Marie Louise Panis; who on the 9th August, 1831, sold to Bernard Marigny, with assignment of rights of warranty; who on the 18th August, sold to plaintiffs.

Richardson died in October, 1833. The plaintiffs finding this defect of title, sue Marigny for a rescission of the sale. Marigny cites in Rosalie Picou, widow Deslonde, to protect him, and Rosalie Picou, alleging these circumstances, and that the heirs of Mrs. Richardson are still living, enumerates them.

The court is called upon to appoint a tutor or curator to these heirs, and the heirs are required to confirm the transaction and rescission of the sale made by their father, or pay half the price of the land and improvements.

The court accordingly appointed Henry D. Richardson, the uncle of the minors, their curator *ad hoc.* He appears, and excepts that he has no power to confirm or annul the transaction.

There is no probate tutor of the minors present. The court considers, that under Code of Practice, 964, and Civil Code, 57, a tutor and curator may be appointed for the minors and absentees, and that a tutor or curator so appointed may execute, exercise, and perform in the particular case, all the rights, duties and functions, which a general probate appointed tutor might exercise; the exception is therefore overruled, and the tutor and curator so appointed, is ordered to answer the petition.

From this interlocutory judgment, the curator *ad hoc*, appealed.

*Peirce*, for the appellant.

*J. Slidell*, for the plaintiffs and appellees.

*Soulé*, for the defendant Marigny.

*Bullard J.*, delivered the opinion of the court.

The tutor *ad hoc* of the minor heirs of Richardson, called in warranty in this case, prosecutes this appeal from an interlocutory judgment of the District Court, making absolute a rule taken on him to show cause why the deliberations of a family meeting, convoked under the authority of the District Court, should not be homologated.

The court has not pronounced a final judgment in the case, upon the rights of the parties; and, we are of opinion, that the judgment upon the rule is not such a one as to authorise an appeal. It is clearly not final, nor can we perceive how it may produce an irreparable injury to the party complaining of it. The power of the District Court to order a family meeting, and to approve a transaction or compromise relating to the interests of minors, recommended by such meeting, may well be inquired into when the whole case is before this court, but we do not think ourselves authorised to pronounce upon those questions, in its present stage.

It is, therefore, ordered, that the appeal be dismissed, with costs.

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vs.  
MARIGNY.

An appeal does not lie from an interlocutory judgment of the District Court, making absolute a rule taken on the appellant to show cause why the deliberations of a family meeting, convoked under the authority of the District Court, should not be homologated. Such judgment does not work an irreparable injury.

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SCHNELLER, CURATOR, &c.  
vs.  
VANCE.

SCHNELLER, CURATOR, &c., vs. VANCE.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF  
NEW-ORLEANS.

A curator appointed by the Court of Probates in this state, to administer a succession opened here, is without authority to administer property or collect debts of the succession in another state.

Citizens of this state who are creditors of a succession opened and administered here, have the moral and legal right to pursue property of the deceased situated in another state, and exercise their rights and claims to it, according to the laws of that state, without being answerable to the curator or administrator here.

So, a creditor of an insolvent succession opened and administered here, who collects his debt out of the property of the deceased debtor situated in another state, is not required by law to refund to the curator here, for an equal distribution among all the creditors.

The plaintiff, curator of the insolvent estate of the late John Finnerty of New-Orleans, alleges that the deceased left property and money in the hands of his agent in Port Gibson, (Mississippi) besides that administered here, and that Gilbert Vance one of the creditors of said estate residing in this city, being aware of the insolvency of the estate, sent to the agent at Port Gibson and presented two promissory notes of the deceased, amounting to one thousand and eighty-eight dollars, and by threats of suit obtained payment thereof. He alleges this money belongs to the succession which he administers as an insolvent one; that the payment to Vance was null, being unauthorised, and that the money should be paid over to him, to be equally distributed among the creditors.

The defendant pleaded a general denial.

The agent at Port Gibson testified, that he was about starting for New-Orleans to settle with the curator of Finnerty's estate for some goods and money of the deceased in his hands, when an attorney presented him with the two

notes of Vance and a letter from the latter, demanding payment of the notes, and in case of refusal to detain said agent by a suit. He paid the money and took a receipt expressing certain conditions, and came to the city and made a settlement with the curator. On his return to Mississippi he returned the first receipt and took another one from the attorney of Vance, for the absolute payment of the two notes mentioned.

The parish judge was of opinion that the succession represented the deceased, and inasmuch as both he and the defendant resided in New-Orleans, the latter could not have sued the former in Mississippi; he had no right to sue his succession there for the purpose of obtaining a preference over other creditors which was forbidden by the laws of Louisiana; that by receiving the money the defendant came under a *quasi* contract with the plaintiff as administrator, by which he was bound to refund to the estate of the deceased debtor.

Judgment was rendered against the defendant accordingly. He appealed.

*Morphy*, for the plaintiff.

1. The property of a debtor is the common pledge of all his creditors, and the proceeds must be divided among them rateably, unless there exist some lawful causes of preference. *Louisiana Code*, 3150.

2. The rights of all creditors of an insolvent estate residing in Louisiana, must be settled according to the laws of this state, and they cannot obtain an undue and illegal preference by sending their claims in another state, where the deceased may happen to have assets. *Louisiana Code*, article 1168 to 1176. *Story's Conflict of Laws*, page 342, et seq. *Note to page 423 up to 438.*

3. An attachment cannot be laid on property belonging to an estate; letters of administration must be taken out according to the laws of the country where the property is situated. 1 *Martin, N. S.*, 380. 2 *Dallas*, 73 and 93.

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SCHNELLER, CURATOR, &c.  
T. VANCE.

**EASTERN DIST.**     **4.** He who receives what is not due to him or more than  
June, 1835.     is due to him, is obliged to restore what he has thus  
**SCHNELLER, CUR- received to the rightful owner. *Louisiana Code, article 2273***  
**RATOR, &c.**     **and 2279.**

**VANCE.**

**5.** The moneys improperly paid to Vance in the state of Mississippi, have never ceased to be the property of the estate of Finnerty, and must be divided among all the creditors.

*Peirce*, for the defendant, contended that the latter having collected his debt and obtained the money from his debtor, according to the laws of the state where the assets were situated, could not be molested in his right to enjoy it here.

*Martin, J.*, delivered the opinion of the court.

This is an action, against a creditor of the estate which the plaintiff administers, as curator, to compel him to refund certain moneys of said estate, which he had received, knowing it was insolvent, that the money thus received may be distributed among all the creditors, according to law. The defendant is appellant from a judgment rendered against

A curator appointed by the Court of Probates, in this state, to administer a succession opened here, is without authority to administer property or collect debts of the succession in another state.

Citizens of this state, who are creditors of a succession opened and administered here, have the moral and legal right to pursue property of the deceased, situated in another state, and exercise their rights and claims to it, according to the laws of state or foreign country.

Inhabitants of this state who are creditors of a deceased person, who died in this state, but left property in another

state or foreign country, have a moral and legal right to go

there and exercise their rights as creditors, for the security and payment of their claims, and their enforcement by law, according to the rules of proceeding which are authorised by the laws of the place where the claim or property is situated.

The defendant in this case, exercised a legitimate right when he proceeded to the state of Mississippi, and there collected his debt, by compelling the person who, by the laws of that state, had become liable to the actions of the creditors of the estate in which he intermeddled, and for the payment of their debts due by it. In doing so, he interfered with none of the effects or funds subject to the legitimate action of the plaintiff, as curator of the estate of the deceased. He rather promoted than injured the interests of the other creditors, since it removed a competitor.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Probate Court be annulled, avoided and reversed, and that there be judgment entered for the defendant, with costs in both courts.

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that state, without being answerable to the curator or administrator here.

So, a creditor of an insolvent succession, opened and administered here, who collects his debt out of the property of the deceased debtor situated in another state, is not required by law to refund to the curator here, for an equal distribution among all the creditors.

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RE A VS. BURT ET AL.

The lessor of a cotton press has no pledge, lien or privilege for the payment of his rent, on cotton sent there by third persons and transiently stored with the lessee, to be re-pressed.

This is an action to recover one thousand dollars from the defendants Burt & Knox, as lessees of the plaintiff's cotton press, for four months' arrearages of rent, with the lessor's privilege on one hundred and fifty bales of cotton, stored therein to be re-pressed.

Rhodes & Peters and others, intervened and claimed the cotton as belonging to them, and which they denied to be

EASTERN DIST. subject to the plaintiff's lien or privilege for arrearages of June, 1835.

RRA  
v.  
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On these pleadings, and the facts appearing substantially on the face of them, the cause was submitted to the court.

The district judge who presided, was against the lessor's privilege. He was of opinion the article 2678 of the Louisiana Code, was conclusive on the subject. If goods sent to an auctioneer to sell, are not liable to the privilege for rent, because they are only transiently there, to be sold; the principle applies equally to cotton sent to be pressed.

*Delvincourt* says, there is no privilege if lessor knew the goods did not belong to the lessee. The lessor of a cotton press may fairly be presumed to know that cotton does not belong to the lessee. *Sirey* and *Paillette* both adduce cases to the same effect. The case from 11 *Martin*, 239, decides no point applicable to the case. Judgment for the claimants and intervenors. The plaintiff appealed.

*Macready*, for the plaintiff, urged the reversal of the judgment. The plaintiff had a right to claim the lessor or landlord's privilege on the cotton stored in his press, for rent due and unpaid by his lessees. *Louisiana Code, articles 2185, 2677, 3157, 3112.*

2. The property of third persons found in the leased premises, and stored with the lessee, is subject to the lessor's privilege for rent. *La. Code, 2677, 2187, 3112. 11 Martin, 242. 1 Ibid., N. S., 718. Civil Code, page 468, article 74.*

*Preston* and *Crawford*, for the claimants and appellees.

*Mathews, J.*, delivered the opinion of the court.

In this case the plaintiff claims one thousand dollars due to him for the rent of a cotton press and stores, and charges the defendant Knox, assisted by other persons, with a forcible and illegal removal from the premises of a certain quantity of cotton amounting to one hundred and fifty bales, which had been there placed for the purpose of storage and

re-pressing; alleging that the removal was made with the intention of defeating his privilege as lessor, on said cotton, and prayed an order for provisional seizure, &c., which was granted. Rhodes & Peters and others intervened and claimed the property thus seized, as belonging exclusively to them, and denied that the plaintiff had any lien or privilege on it. Judgment was rendered in favor of the claimants, from which he appealed.

The testimony of the case shows that the cotton thus seized had been received by the defendants, for the purpose of being stored and pressed in the usual course of their business, &c., and was not their property.

The sole question arising out of these facts, is, whether property situated as this was, must be considered as pledged, by operation of law, to secure the payment of rent to the proprietor and lessor of the stores and press. Its solution depends on certain articles of the Code. The article 2675 gives a right of pledge on the moveable effects of the lessee, in favor of the lessor, for the payment of his rent, &c., which may be found on the property leased.

By the following article, this right includes the effects of sub-lessees, so far as they may be indebted to the principal lessor. The article 2677 is that on which the plaintiff mainly relies: it declares, that the right of pledge not only affects the moveables of the lessee and under-lessees, but also those belonging to third persons, when their goods are contained in the house or store, by their own consent, express or implied. As it follows immediately the preceding article, which limits the liability of sub-lessees, it may well be considered as having reference to those limitations, as it would be extremely unreasonable to place third persons who have less to do with the premises leased than under-lessees, in *duriori casu*, than the latter. But we are of opinion that property situated like that of the claimants in the present instance, is subjected to no lien or right of pledge whatever, in favor of the lessor; it was transiently in the store, to be re-pressed, and the article 2678 declares positively that the

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The lessor of a cotton press, has no pledge, lien or privilege for the payment of his rent, on cotton sent there by third persons, and transiently stored with the lessee, to be re-pressed.

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**EASTERN DIST.** lessor's right of pledge does not extend to property thus  
June, 1835. situated.

HENSHAW

vs.

LADD.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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**HENSHAW vs. LADD.**

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

The law authorises the creditor to arrest his debtor and hold him to bail, when he is about to depart from the state, even for a short time, when he leaves no property behind. It is not sufficient, that he has settled and commenced permanent business in the state, to exempt him.

This is an action of debt, in which the plaintiff claims from the defendant the sum of two thousand and fifty-nine dollars thirty-seven cents, money lent to the latter, in New-York, on or about the 30th October, 1833. The defendant was held to bail. He took a rule on the plaintiff, to show cause why the bail should not be discharged, on his disproving the facts stated in the plaintiff's affidavit to obtain the order of bail.

The defendant showed that he had done business as a commission merchant, in the city of New-Orleans, two or three seasons; and had rented stores and houses, with a view to a permanent residence here; but that he left the state every summer, without leaving any property, and that his intentions were to leave again this summer.

The district judge was of opinion, the bail ought to be discharged, and made the rule absolute.

*Benjamin*, for the plaintiff and appellant, contended, that the evidence clearly showed the defendant was about to depart from the state, without leaving in it sufficient property to pay the plaintiff's demand.

2. A debtor may be arrested, though he may not intend permanently to absent himself from the state. An intention made known to depart, is sufficient. *Code of Practice, verbo arrest.*

*Smith, contra.*

*Martin, J.*, delivered the opinion of the court.

This is an appeal from an order discharging bail. The plaintiff and appellant complains of an order or judgment rendered by the District Court, making a rule absolute which had been taken against him, to show cause why an order of bail which he had obtained, should not be set aside, and the bail bond of the defendant cancelled.

The order of bail had been made on the usual affidavit of the plaintiff, that the defendant was about to depart from the state, without leaving sufficient property to discharge his claim. The excision of the order was sought, by an attempt to disprove the facts in the plaintiff's affidavit, on which it was obtained. For this purpose, the defendant introduced several witnesses, who testified that they had known him whilst living in Boston, where he came from, and since he came to New-Orleans, where he now resides, and has resided for some time; that he has rented a store, a dwelling house for his family, and a pew in a church, and is now carrying on mercantile business; and that his intentions are to establish himself in this city as a commission merchant, in which business he has been employed for some time past, and which is thriving.

These facts are not inconsistent with those sworn to by the plaintiff. A new comer generally absents himself from the state, during the sickly season; and the law authorises a plaintiff to demand bail from a debtor, who is about to quit the state for a short time, when he leaves no property behind.

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vs.

LAUD.

The law authorises the creditor to arrest his debtor, and hold him to bail, when he is about to depart from the state, even for a short time, when he leaves no property behind. It is not sufficient that he has settled and commenced permanent business in the state, to exempt him.

**EASTERN DIST.** This is the fact sworn to by the plaintiff, and not contradicted  
*June, 1835.* by the testimony.

**PETERS & MILLARD**

**LARD.**  
**vs.**

**DORSEY ET AL.**

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be annulled, avoided and reversed, and the rule discharged, the defendant and appellee paying the costs of this appeal.

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**PETERS & MILLARD vs. DORSEY ET AL.**

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

The verdict of a jury in a case, involving altogether matters of fact, will not be disturbed, although the testimony in the record seems to preponderate in favor of the other party, and is somewhat contradictory, when the judge and jury who heard the witnesses, were satisfied ; and when the verdict does not appear so palpably erroneous as to require interference.

The plaintiffs sue Greenbury Dorsey and Charles Creighton, for the sum of two hundred and seventy-five dollars, the amount of one month's rent due on a lease of a certain store and warehouses.

The defendants aver they leased the houses for a year, and that the plaintiffs failed to keep them in repair ; that they soon became so leaky as rendered them wholly unfit for use, and injured their goods, &c. They aver they notified the plaintiffs of these defects, who always refused to repair them ; that they have sustained damage by injury to goods, loss of storage, &c., in the sum of three hundred and fifty dollars, for which they claim a judgment. They pray for the annulment of the lease and a discharge from all liability under it.

Evidence was taken and introduced relative to the issue between the parties touching the condition of the premises, upon which, under the pleadings, the cause was submitted to a jury. A verdict and judgment thereon was rendered for the plaintiffs. The defendants appealed.

EASTERN DIST.  
June, 1835.

PETERS & MIL-  
LARD.  
vs.  
DORSEY ET AL.

*Carleton and Lockett*, for the plaintiffs.

*Smith, contra.*

*Mathews, J.*, delivered the opinion of the court.

This suit is brought to recover one month's rent for the use of a certain house or store, leased to the defendants at the rate of two hundred and seventy-five dollars per month. They oppose payment and pray a rescission of the contract of lease, (which is for a year) on the grounds that the house or store leaks so badly, as to be unfit for the purposes for which it was leased, &c. The cause was tried by a jury in the court below, who rendered a verdict in favor of the plaintiffs, and judgment being thereon rendered, the defendants appealed.

The correctness of this verdict and judgment, depends altogether on matters of fact, of which a jury are considered as capable of judging as a court. It is true, the testimony as shown on the record, appears to us to preponderate in favor of the defendants; but, it seemed different to the judge and jury who saw and heard the witness. A motion for a new trial was overruled by the judge *a quo*, which shows that he was satisfied with the conclusions of the jury on the evidence. The facts disclosed are somewhat contradictory. The decision of the jury on them, does not, however, appear to us so palpably contrary to truth, as to require our interference.

The verdict of a jury, in a case involving altogether matters of fact, will not be disturbed, although the testimony in the record seems to preponderate in favor of the other party, and is somewhat contradictory, when the judge and jury who heard the witnesses, were satisfied, and where the verdict does not appear so palpably erroneous as to require interference.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.  
June, 1835.

MILLER.  
vs.  
WEBB.

**MILLER vs. WEBB.**

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

26.2258

2259

3 M 257

7 LN 206

13 LN 213

16 LN 471

1 RN 214

2 RN 112; 128

Parole testimony is admissible to prove that the lost bill of exchange sued on, was duly advertised, without the production of the advertisement, or the newspaper in which it was published.

On due proof of the existence, loss and contents of a bill of exchange, the owner will recover its amount, on tendering security to indemnify the party against a second payment.

This is a suit instituted against the acceptor of a draft. The petitioner alleges that a draft had been accepted, and that he inclosed it to a friend in New-Orleans, to present it for payment and collect the proceeds, and which was mislaid and lost before it reached its destination. He alleges he notified the defendant of the loss of the draft, demanded payment, and tendered security according to law against repayment.

The defendant pleaded the general issue. The plaintiff's counsel introduced the affidavit of his client, showing the tenor, date and amount of the bill, and stating its loss after it had been accepted ; and that in consequence of the loss of said bill, the drawer had given him a second draft on the defendant. The affidavit was received without objection.

A witness was introduced, who testified that he called on the defendant about the draft in question, who admitted he had accepted it. That witness has also a general recollection that the draft was advertised as having been lost ; but he did not see the advertisement in the newspapers. This testimony was objected to by the defendant, so far as regards the advertisement, on the ground that it was not the best evidence of the fact ; a printed copy of the advertisement or the newspaper in which it was published should have been produced. The testimony was received and a bill of exceptions taken.

Judgment was rendered in favor of the plaintiff, for the amount of his claim. The defendant appealed.

EASTERN DIST.  
June, 1835.

*Carleton and Lockett*, for the plaintiff.

MILLER  
vs.  
WEBB.

*Roselius, contra.*

*Martin, J.*, delivered the opinion of the court.

This is an action on a lost bill of exchange. The plea is the general issue. The existence, contents and acceptance of the bill by the defendant, on whom it was drawn, are all duly proved.

The loss was established without any opposition, by the oath of the plaintiff himself.

On the trial, the defendant's counsel took a bill of exceptions to the introduction of a witness, who was produced on the part of the plaintiff, to prove that the loss of the bill was duly advertised. The objection was grounded on the principle that the advertisement itself should have been produced, as the best evidence the case admitted.

A newspaper is seldom susceptible of proof as to the period of its publication. It is not like a written instrument, containing signatures and other authentic marks, the genuineness of which is susceptible of legal proof. But even such written instruments, when under private signature, afford no evidence of the time of their confection and execution, notwithstanding it is established by dates. The testimony of a witness, as to a publication in a newspaper, was, therefore properly admitted.

The plaintiff having tendered security to indemnify the defendant against paying the bill a second time, and the court having ordered it to be given, judgment was correctly rendered in favor of the plaintiff for the sum claimed.

Parole testimony is admissible to prove that the lost bill of exchange sued on was duly advertised, without the production of the advertisement, or the newspaper in which it was published.

On the proof of the existence, loss, and contents of a bill of exchange, the owner will recover its amount, on tendering security to indemnify the party against a second payment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.  
June, 1835.

GARRITSON  
vs.  
HIS CREDITORS.

**GARRITSON vs. HIS CREDITORS.**

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

When the appellant brings up his case without furnishing any legal means by which it can be examined on its merits, it will be dismissed.

In this case, Baxter & Hicks took a rule on Jedediah Leeds, syndic of the creditors of the ceding debtor, to show cause why he should not pay over to them, as privileged creditors, the sum of one thousand four hundred and twenty-one dollars, being the net proceeds of the sale of the steam-boat Red Rover, in conformity with the decree of the Supreme Court. See 7 *Louisiana Reports*.

On hearing the parties, the rule was made absolute, and the syndic ordered to pay over said funds accordingly. The syndic appealed.

*Carleton and Lockett*, for the appellant.

*Hennen, contra.*

*Bullard, J.*, delivered the opinion of the court.

When the appellant brings up his case, without furnishing any legal means, by which it can be examined on its merits, it will be dismissed.

This appeal is brought up without any statement of facts, or certificate of the judge, or the clerk, as required by law, and there is no assignment of errors nor bill of exceptions. The appellant has not furnished us with any legal means by which we can test the correctness of the judgment rendered in the court below.

It is, therefore, ordered, that the appeal be dismissed, with costs.

EASTERN DIST.  
June, 1835.

GARCIA ET AL.  
VS.  
CHAMPOMIER  
ET AL.

## GARCIA ET AL. VS. CHAMPOMIER ET AL.

## APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Brokers are persons who negotiate for others, and as acknowledged agents have power to bind their principals.

But persons stipulating to furnish flour at a fixed price, for a certain commission, and at a given day, will be considered as acting for themselves, and be personally responsible for their contracts.

In commutative contracts the defendants need not be put *in morâ* by a tender of the price, when it is shown they refused positively, and declared they were unable to comply, when demanded to do so.

This is an action claiming damages of the defendants, in the sum of three thousand five hundred dollars, for the non-fulfilment of a contract to deliver one thousand barrels of flour, at four dollars fifty cents per barrel, to the plaintiffs.

The plaintiffs allege that they contracted with the defendants, for the delivery to them on the 29th of June, 1834, in New-Orleans, of one thousand barrels of flour, at four dollars fifty cents per barrel; that they demanded the performance of the contract on the day appointed, but that the defendants failed and refused to comply with their part thereof, and that since that time, up to bringing suit the 2d July following, flour rose to eight dollars per barrel, whereby they are damaged three thousand five hundred dollars; that they put the defendants in default for the non-delivery thereof.

The defendants pleaded a general denial, and further averred, that in their capacity of brokers, (*courtiers de marchandises*), they promised, on or about the 20th June, 1834, to furnish to the plaintiffs, a certain number of barrels of flour, at a fixed price, for which they were to receive brokerage commission, at two and a half per cent. on the price; that, during several days after this time, they used all the means in their power, and were unable to procure the flour; that there was but little in market, and none of

## CASES IN THE SUPREME COURT

**EASTERN DIST.** the quality required. They deny that the plaintiffs have  
*June, 1835.* sustained any damage, &c.

**GARCIA ET AL.**  
*vs.*  
**CHAMPOMIER**  
*ET AL.*

The parties went to trial on these pleadings.

The agreement between the parties is contained in the following counter parts:

"We have sold to Messrs. Garcia, Buyo & Co., for cash, one thousand barrels superfine flour, at four dollars fifty cents per barrel, which we will deliver in the course of the next week, under the condition that it will be inspected at the time of delivery; the said Garcia, Buyo & Co., paying two and a half per cent.

*New-Orleans, June 20, 1834.*

**CHAMPOMIER & GIRAUD."**

"Said flour to be delivered and received by Garcia, Buyo & Co., at any day the vendors may get ready to deliver it, between this and the end of next week.

**C. & G."**

"We have purchased of Champomier & Giraud, for cash, one thousand barrels superfine flour, at four dollars fifty cents per barrel, to be delivered in the course of the next week, already inspected; allowing them two and a half per cent. on the amount of said flour, for brokerage.

*New-Orleans, June 20, 1834. GARCIA, BUYO & CO.*

"Said flour to be delivered and received by Messrs. Garcia, Buyo & Co., at any day the vendors may get ready to deliver it, between this and the end of next week.

**G. B. & CO."**

The plaintiffs sue for the non-compliance with this commutative contract by the defendants. It is proved they were regularly put *in morâ*, but it is not shown that the money was tendered. The defendants admit their inability to comply. Flour rose rapidly at the time of the contract, and sold at seven dollars fifty cents per barrel, by the last of June. The plaintiffs had to give this price to comply with an engagement of theirs.

The District Court decreed three thousand dollars in damages to the plaintiffs, which it was determined they had sustained, in consequence of the non-compliance by the defendants with their contract, *less* two and a half per cent. on four thousand five hundred dollars. The defendants appealed.

EASTERN DIST.  
June, 1835.

GARCIA ET AL.  
VS.  
CHAMPOMIER  
ET AL.

*Canon*, for the plaintiffs.

*Morphy* and *Grailhe*, for the appellants.

1. In the transaction which took place between García, Buyo & Co., and the appellants, respecting one thousand barrels of flour, the last did not bind themselves personally, but acted as brokers, *courtiers de marchandises*.

2. Admitting for a moment, that Champomier & Giraud were personally bound, they cannot be condemned to pay any damages for the non-compliance of their obligation; because, at the time fixed for the execution of the same, there existed an actual impossibility to perform it. *Louisiana Code*, 2116.

3. The plaintiffs cannot succeed in their action for damages, because they have not fulfilled all the preliminary requisites of the law, to put the defendants in default: they claimed the flour, which they pretended had been sold to them by the defendants, but they did not tender to them the price stipulated, nor offer to pay, which formality was essential. See *Louisiana Code*, articles 1907, 1927, 1905. *7 Martin*, 166. *6 Louisiana Reports*, 154.

4. In synallagmatic contracts the party who claims damages for the inexecution of the obligations of the other party, must show clearly that he was ready and prepared to execute his part of the contract. *Louisiana Code*, article 1907.

5. If the sale were obligatory on the part of the brokers, being made for cash, the purchasers were bound to pay or tender the price previous to the delivery of the thing sold. *Louisiana Code*, 2463. *Duranton, Cours de Droit Français*, vol. 1, pages 217, 218.

EASTERN DIST.  
June, 1835.

GARCIA ET AL.  
VS.  
CHAMPOMIER  
ET AL.

*Mathews, J.*, delivered the opinion of the court.

In this case the plaintiffs claim damages for the inexecution of a contract, by which the defendants agreed to deliver to them one thousand barrels of flour for the price of four dollars and fifty cents per barrel, the price to be paid at the time of delivery, &c. The court below gave judgment for the plaintiffs and assessed their damages at two thousand eight hundred and eighty-seven dollars and fifty cents, from which the defendants appealed.

The contract is positive and explicit, and the appellants refused to fulfil the obligations imposed on them by it, within the period stipulated, although requested by the plaintiffs, who afterwards purchased the same quantity of flour at a higher price, in order to comply with an engagement which they were under to some other persons. The damages claimed and awarded is the difference between four dollars and fifty cents per barrel and the price which they were obliged to pay, &c.

On this simple statement the judgment of the court below appears evidently just and legal.

But, it is contended on the part of the appellants, that they are not responsible on that contract, because they acted

Brokers are persons who negotiate for others, and as acknowledged agents, have power to bind their principals.

But persons stipulating to furnish flour at a fixed price, for a certain commission, and at a given day, will be considered as acting for themselves, and be personally responsible for their contracts.

In commutative contracts, the defendants need not be put *in morā* by a tender of the price, when it is shown, they refused positively, and declared they were unable to comply, when demanded to do so.

It is further contended, that the contract being commutative the defendants ought not to be condemned to pay damages, because they were not legally put *in morā* by a tender of the price, &c. The testimony of the case shows, that they refused positively to comply with the contract, alleging as a reason, the impossibility of procuring the flour which they had stipulated to deliver to the plaintiffs. Under such circumstances, we cannot imagine any thing more vain and

## OF THE STATE OF LOUISIANA.

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nugatory than an offer to pay the price would have been, EASTERN DIST.  
et lex nemini coget ad vana, &c. JUNE, 1835.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.  
June, 1835.

**TOBY & CO.**  
**vs.**  
**HART ET AL.**

**TOBY & CO. vs. HART ET AL.**

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

When several persons, residing in different parishes, contract a joint obligation, they must all be sued jointly, and judgment rendered against each for his portion; but they may all be sued at the domicil of any one of them, which is an exception to the general rule, and they are considered as having waived their personal privilege to be sued at their domicil.

The plaintiffs instituted suit as the holders, and for the recovery of the amount of the following note :

**"\$1200** *New-Orleans, 20th July, 1832.*

*New-Orleans, 20th July, 1832.*

"Two years after date, we promise to pay to the order of J. H. Kroft, at the United States Branch Bank in this city, twelve hundred dollars, for value received.

"H. M. HART,

“H. M. HYAMS.

Endorsed, "J. H. Kroft, Thomas Toby, J. H. Field, & Co."

The defendants severed in their answers. *Hart* admitted his signature, and averred he could only be jointly liable in any event, for his portion of the note, and set up sundry matters in defence. *Hyams* pleaded an exception, that he

EASTERN DIST.  
June, 1835.

TODY & CO.  
*vs.*  
HART ET AL.

had his domicil in the parish of Ascension, and could not be sued in the parish of Orleans. The exception was overruled.

Judgment was rendered against the defendants, jointly and severally, for the amount of the note sued on. Both of them appealed.

*Carleton and Lockett*, for the plaintiffs.

*L. Janin and Benjamin*, for the defendants.

*Bullard, J.*, delivered the opinion of the court.

The appellant assigns for errors apparent on the face of the record, first, that the plea of Hyams to the jurisdiction of the court was improperly overruled, and second, that the judgment is *in solido*, on a joint obligation.

I. The first assignment, we think, cannot avail the party. The obligation on which the suit is brought, is manifestly a joint one, and the 2080th article of the *La. Code*, requires

When several persons, residing in different parishes, contract a joint obligation, they must all be sued jointly, and judgment rendered against each for his portion; but they may all be sued at the domicil of any one of them, which is an exception to the general rule, and they are considered as having waived their personal privilege, to be sued at their domicil.

II. The second assignment is well taken, and we presume the judgment was entered up *in solido* through inadvertence. But we think ourselves bound to amend in this particular.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and that the

plaintiffs recover from each of the defendants, the sum of six hundred and one dollars seventy-five cents, with legal interest on the amount of the note from the 29th of February, 1834, and costs in the District Court, and that the plaintiffs and appellants pay the costs of appeal.

EASTERN DIST.  
June, 1835.

MITCHELL  
vs.  
JOHNSON.

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MITCHELL vs. JOHNSON.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

The last purchaser of a plantation and slaves may pay off previously existing debts due by his and their vendors, and for which the premises are liable; and be subrogated to the rights of these creditors, and compensate such payment against the instalments as they become due to his vendor.

This is an action to recover from the defendant the second instalment of the price of a tract of land and slaves, amounting to four thousand six hundred and sixty-six dollars and sixty-seven cents, which the latter purchased of the plaintiff.

The defendant sets up a sum in compensation of the plaintiff's demand, which he avers he was compelled to pay to former vendors of the land in question, and for which the land itself was bound.

The facts of the case are set out in the opinion of the court.

The district judge who tried the cause, was of opinion that the plaintiff had no cause of action, and gave judgment for the defendant. The latter appealed.

*Nicholls and Taylor*, for the plaintiff.

*Porter, contra.*

EASTERN DIST.  
June, 1835.

MITCHELL  
vs.  
JOHNSON.

*Martin, J.*, delivered the opinion of the court.

The defendant being sued for the recovery of the second instalment of the price of a sugar plantation and slaves, in the parish of Lafourche, resists the plaintiff's demand on the ground of his having been obliged to pay large sums of money to relieve the land in question from liens and mortgages, which the plaintiff, his vendor, was bound to discharge, and claims that these payments may be compensated against the instalment now sued upon. Judgment was rendered against the plaintiff, from which he appealed.

The facts of the case are the following: In 1814, Field bought of Thibodeaux a tract of land containing nineteen arpents in front, and undertook to pay a sum of money due to Wells, who was Thibodeaux's vendor, being the balance due on the land for the original price. To this tract Field added a smaller one of two arpents more in front, and sold one moiety of the whole to the defendant, and the other moiety to the plaintiff who held it in common with one Kendall, and who undertook to pay off by instalments the sum of fourteen thousand one hundred and twenty dollars, which still remained due to Thibodeaux.

The plaintiff afterwards sold his half of the latter moiety with some slaves thereon to the defendant for twenty thousand dollars. Of this sum six thousand dollars was paid in cash, and the remainder was made payable in three annual instalments of four thousand six hundred sixty-six dollars and sixty-seven cents each. It was also stipulated in the contract of sale, that the defendant be authorised to deduct such sums as he might be obliged to pay off to the original vendors, to relieve the land from that portion of the original price which was still due to Wells's heirs, and which the plantation was bound to discharge.

On a settlement with the defendant, Field the vendor of the plaintiff, acknowledged the full payment of all his demands and transferred to him a claim against the plaintiff and Kendall for six thousand three hundred and seventy-eight dollars. These persons had failed to pay any thing towards discharging Wells's mortgage. The second instal-

ment of the defendant's purchase from the plaintiff, for which the present suit is brought, amounts to four thousand six hundred and sixty-six dollars and sixty-seven cents.

The one-half of the claim of Field on the plaintiff and Kendall, was consequently, three thousand one hundred and eighty-nine dollars; and the one-half of the portion of the money they ought to have paid in discharge of Wells's mortgage, amounts to two thousand six hundred and forty-two dollars and thirty-eight cents.

The counsel for the plaintiff contended in argument in this court: First, that by the contract between Field and Thibodeaux with the assent of Wells, Field became personally bound to fulfil and discharge the hypothecary obligations which existed on the land.

2. All the land held by the defendant was subject to those obligations, and that the plaintiff, Kendall and Field, were personally bound for them.

3. Whatever sums the plaintiff and Kendall, or Johnson, might have to pay in order to free the land from these incumbrances, they were entitled to recover from Field in consequence of his warranty, and because he was personally bound for the debt to which it was an accessory.

4. The defendant was indebted to Field in a sum due to him on the price of the land, and Field became indebted to the defendant for the amount paid him in satisfaction of Wells's mortgage, and both debts were compensated by the mere operation of law.

5. The settlement between the defendant and Field taken in connexion with the record of the suit of the former shows, that compensation took place by consent of parties, since they mutually released and discharged each other from all claims. The defendant became the hypothecary creditor by subrogation, and was paid by the debt due by him to Field, the original debtor. The principal obligation due by him, was consequently discharged and the mortgage extinguished.

6. The only shadow of claim which the defendant had on the plaintiff, grew out of the transfer of the claim of Field against the plaintiff and Kendall, and of which the plaintiff

EASTERN DIST.  
June, 1835.

MICHELL  
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## CASES IN THE SUPREME COURT

EASTERN DIST.  
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owes one-half. That the defendant only stands in the place of Field who could not, under these circumstances, enforce payment. He was bound to pay the Wells mortgage, and if he could not, his transferee cannot claim under him the right of doing so.

The last purchaser of a plantation and slaves, may pay off previously existing debts, due by his and their vendor, and for which the premises are liable, and be subrogated to the rights of these creditors, and compensate such payment against the instalments as they become due, to his vendor.

We are of opinion the district judge did not err in allowing the defendant the benefit of the payment to Field, and subrogation to his rights against the plaintiff and his partner in interest, Kendall. Field was entitled and had the undoubted right to demand from these persons the balance of the price of the land, or whatever sum they may owe on their purchase from him; although it is true, he is personally bound toward Wells, Thibodeaux and the defendant, for the remainder of the price which Thibodeaux owed to Wells at the time Field purchased. He may also be bound to the plaintiff and Kendall his last vendees, to protect them against the pursuits of Wells and his heirs, as long as they punctually pay the annual sums which Field stipulated they should pay, in discharge of the Wells mortgage.

It is not urged that the plaintiff is in danger of being disturbed in his possession by Wells's heirs. He has, therefore, no right to withhold from the defendant the amount of the claim which was transferred to him by Field, and which extinguishes the demand sued on.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.  
June, 1835.

ORY  
vs.  
HIS CREDITORS.

ORY vs. HIS CREDITORS.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE  
THEREOF PRESIDING.

Where a mortgage was given to secure endorsements to a certain specified amount, which are soon afterwards made, and it is proved that new notes are taken in renewal of the original ones, with the same endorsement: *Held*, that the endorser can claim the benefit of the mortgage to secure the payment of the new notes, over ordinary creditors.

This case arises out of the classification of the privileged and mortgaged debts of the insolvent, as presented in the tableau of classification and distribution, by the syndics. Pierre Dubertrand, Joseph Abat and others are placed as mortgage creditors for notes and acceptances which they have bound themselves to pay, on account of the ceding debtor.

Michel Bergeron and others, chirographery creditors of the insolvent, oppose a certain mortgage in favor of Dubertrand and others, which gives them a privileged claim, on the ground that it was fraudulently obtained, when the insolvent was in failing circumstances, and with a view to give them a preference over other creditors. They, therefore, oppose the homologation of the tableau, and pray that it be amended, by annulling the mortgage, &c.

The evidence shows Dubertrand took a mortgage on the plantation of the insolvent, in April, 1832, to secure the sum of sixteen thousand dollars, in prospective endorsements, and soon after actually endorsed for that sum, on notes which were thrown into market and sold. Dubertrand exhibited an extract from his own mercantile books, which was received in evidence, by consent, by which it was shown that the first notes endorsed had been negotiated, and, as they became due, taken up by Dubertrand, and other notes given by the insolvent, in renewal of them, and endorsed by Dubertrand,

## CASES IN THE SUPREME COURT

EASTERN DIST. to the amount of fifteen thousand nine hundred and eighty dollars. For the benefit of the holders of these notes, the mortgage is now claimed.

BY  
THE  
HIS CREDITORS.

The district judge, after correcting a small claim of Dubertrand on the tableau, sustained the mortgage in behalf of the notes, and dismissed the opposition. The opponents appealed.

*A. & J. Seghers*, for the appellants contended that, by taking new notes, and surrendering the original ones, the debt was novated and the mortgage extinguished. *Louisiana Code, article 2191. Morgan vs. His Creditors, 1 Louisiana Reports, 527.*

*Deblieux, contra.* The mortgage was given in accordance with the *Louisiana Code, article 3259.*

*Martin, J.*, delivered the opinion of the court.

This is a case of insolvency. Bergeron and other creditors of the insolvent debtor are appellants from a judgment dismissing their opposition to the claims and rank in which Dubertrand and others, holders of certain promissory notes of the insolvent, and endorsed by Dubertrand, occupy on the tableau of classification and distribution of the insolvent's estate.

The counsel for the appellants have contended in this court, that the District Court erred in dismissing their opposition, on several grounds:

1. Because the original debt and notes endorsed by Dubertrand, to secure the payment for which the mortgage was given, have been novated.

2. But even admitting, for argument sake, (the proposition being denied,) that, by surrendering the original notes, the debt was not novated, nor the mortgage to secure it extinguished, there is no legal proof that the notes, on which the mortgage is now claimed, were given for the renewal of the original notes endorsed by the appellee.

**3.** The mortgage was given to secure Dubertrand from the consequences of his liability as an endorser, and he does not show that he has paid any thing on his endorsement. The payment of the notes of the insolvent debtor, are now claimed to be paid out of the property surrendered.

The mortgage deed shows that the mortgage was given to secure Dubertrand for endorsements and acceptances *made and to be given*; and the benefit of the mortgage is given to *holders* of such endorsements and acceptances.

The record shows that the original notes endorsed by the appellee were given for the sum of sixteen thousand dollars. The evidence in the case, which appears to have been introduced and received without objection, but which might have been objected to, established the fact that the notes for which the benefit of the mortgage originally executed is now claimed, were given for the renewal of the original notes. This fact appearing, from evidence received without objection, the opposition of the appellants was correctly overruled.

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RODNEY ET AL.  
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DIXON.

Where a mortgage was given to secure endorsements, to a certain specified amount, which are soon afterwards made, and it is proved that new notes are taken in renewal of the original ones, with the same endorsement: *Held*, that the endorser can claim the benefit of the mortgage, to secure the payment of the new notes, over ordinary creditors.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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**RODNEY ET AL. vs. DIXON.**

**APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF  
NEW-ORLEANS.**

The Code of Practice, article 583, requires the appeal to be made returnable to the next term of the Supreme Court, after it is taken.

So, an appeal granted the 30th March, and citation served the next day, which was made returnable to the *first* Monday in May, was dismissed. It should have been taken to the *next* or April term.

## CASES IN THE SUPREME COURT

EASTERN DIST.

June, 1835.

RODNEY ET AL  
vs.  
DIXON.

The facts and dates, in obtaining and taking up this appeal, are fully and correctly stated in the opinion of the court.

*Benjamin*, for the appellees, moved to dismiss the appeal in this case, on the ground, that it was not made returnable to the proper term of the Supreme Court. *Code of Practice*, 583. *Petit et al. vs. Drane, ante 218.*

*Jackson, contra.*

The Code of Practice, article 583, requires the appeal to be made returnable to the next term of the Supreme Court, after it is taken.

So, an appeal granted the 30th March, and citation served the next day, which was made returnable to the first Monday in May, was dismissed. It should have been taken to the next or April term.

This case cannot be distinguished from that of *Petit et al. vs. Drane, ante 218*, lately decided by this court.

The Code of Practice, article 583, requires the appeal to be made returnable to the *next term* of the Supreme Court. The present appeal, ought, therefore, to have been made returnable to the *next* or April term.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed, with costs.

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June, 1835.

MILLER VS. BRIGOT ET AL.

MILLER  
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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The person who furnishes materials to the undertaker, has no action against the owner of the buildings, when he suffers the latter to pay according to his stipulation with the former, before suit is instituted.

No debtor is bound to pay a debt by portions, and no partial transfer can be made by a creditor so as to be binding on a debtor, even when notice is given, except by the express consent of the latter.

The proprietor is not even obliged to accept a draft drawn on him by the undertaker, in favor of the material man, for a part of a payment which is to become due, nor to pay it then. He may pay the whole sum to the undertaker, when it is due, or when he receives the work, unless suit is previously brought.

This suit is instituted against N. Brigot, the proprietor, and J. M. Fernandez, the undertaker of three brick buildings for the former, to render the proprietor liable for a draft of six hundred dollars, which the undertaker drew on him, in favor of the plaintiff for materials furnished, payable when the buildings were completed, or out of the last instalment, which was protested for non-payment.

The defendant pleaded a general denial.

The evidence showed that Brigot, the proprietor, made the last payment and received the buildings and an acquittance from Fernandez, the 11th of November, 1834, and the present suit was instituted the 4th of December following. That before this payment was made, Fernandez drew the draft in question, which the proprietor refused to pay and suffered to be protested.

The cause on the testimony and arguments of counsel was submitted to a jury. The district judge charged, "that a furnisher of materials, as the plaintiff in this case, to an undertaker, (Fernandez) who is not paid, may bring his action and cause the moneys due to the undertaker by the

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owner, to be seized, and he would of course be subrogated to the privileges of the former on the buildings of the latter; but that this can only be done by suit. That the proprietor is not bound to pay a draft in favor of the material man, which would be paying a debt by portions, but that he can only be bound by a suit and seizure in his hands of money before it is due, and payable to the undertaker. The plaintiff's counsel took his bill of exceptions to the charge.

The jury returned a verdict for the defendant, Brigot, upon which judgment was rendered, and the plaintiff appealed.

*L. Janin*, for the plaintiff.

1. The true reason why defendant refused to accept the draft, though he now endeavors to gloss it over, is, that he had paid the undertaker in anticipation. Such payments are no defence against material men. *Louisiana Code*, 2745.

2. The pretension that plaintiff ought to have furnished no materials to the undertaker, without previously having taken defendant's consent is entitled to no consideration. The plaintiff and the undertaker never submitted to this improper interference.

3. The draft was an assignment of part of the funds created by the contract, and as soon as it was notified to the defendant, it was binding against him and against third persons in general. *Louisiana Code*, 2613.

4. The District Court erred in charging the jury, that notice of such an assignment could be given only by suit; that defendant had a right to disregard every other kind of notice. The subrogation of material men to the rights of the undertaker, exists without a seizure; the proprietor of the buildings is bound to respect it, as soon as he is distinctly informed of the agreement of both the undertaker and the furnisher of materials, that the value of the materials shall be paid by him. A seizure is one mode of notifying the proprietor of the claim and of arresting the funds in his hands; the notice of the assignment is another, and not less effectual. A seizure may be necessary where the claim or its amount is not admitted by the undertaker, but when a settlement has

been made and a draft given, there is no necessity for the seizure. *Nolte vs. His Creditors*, 6 *Martin, N. S.*, 168.

5. The draft was payable only when the buildings should be delivered. It was then only that the plaintiff's claim against the defendant accrued, and the latter took an acquittance from Fernandez at the same time that he received the buildings. It is thus that he endeavored to defeat the plaintiff's rights by his own act, which cannot be tolerated.

6. The defendant was bound to accept the draft, and the plaintiff cannot, in consequence of his illegal refusal, suffer any loss.

*Preaux*, for the defendants.

1. The buildings for which the plaintiff alleges he furnished materials, were finished and received before the institution of this suit, so that if he ever had any claim, his privilege is lost, as the owner of the buildings and undertaker had settled.

2. Brigot, in his written contract with Fernandez, did not give the latter the right of drawing drafts on him, or dividing the debt into portions.

3. The time of payment was fixed, and the proprietor could not deviate from the written agreement without exposing himself to the danger of paying twice.

4. The plaintiff had no right of action against Brigot; he could only seize the amount of his debt in the hands of the proprietor by suit, before the payment became due, and in this way enforce his privilege, if any he had.

*Mathews, J.*, delivered the opinion of the court.

This is a suit brought by the furnisher of materials to a builder who undertook to erect certain houses for the defendant, in which the price or value of the materials furnished is claimed directly from the latter. The cause was submitted to a jury, a verdict was found for the defendant, and the plaintiff appealed from a judgment rendered in pursuance of the verdict.

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The facts of the case show, that the materials were delivered to the undertaker to be used in the construction of the buildings for the defendant, and that an order or draft for the price was given to the furnisher, drawn by the former on the proprietor, to be paid out of a certain sum which was to become due to the undertaker, on the completion of his work. The drawee refused to accept the draft, which was protested, &c. On the 11th of November, 1834 the buildings were completed and delivered to the proprietor, who at that time fulfilled the obligations arising from the contract between him and the undertaker, by paying the full amount stipulated, to the latter. On the 4th of December following, the present suit was commenced.

The legal questions arising out of the facts, were settled by a charge of the judge *a quo*, to the jury, and the correctness of the verdict and final judgment depends on the propriety of the manner in which those questions were settled. The charge was based on the articles 2741, 2744 and 2745 of the *Louisiana Code*. They relate to workmen who have been employed by undertakers in the construction of buildings, and persons who furnish materials, &c. The plaintiff is in the category of the latter, having furnished materials by contract with the undertaker. According to article 2744, he had no action against the owner, the latter having paid the whole sum stipulated to the undertaker before the institution of the present suit; and it does not appear that he paid in anticipation. The judge below was therefore correct in stating to the jury, that under these articles the plaintiff is without remedy. But it is contended on his part, that the order to pay, given by the undertaker and presented to the defendant, amounted to a transfer *pro tanto* of the credit and notice to the debtor, according to article 2613 of the Code, found in the chapter which treats of the assignment and transfer of debts, &c.

The proprietor is not even obliged to accept a draft drawn on him by the undertaker, in favor of the material man, for a part of a payment which is to become due, nor

In answer to this proposition, it suffices to say, that no debtor is bound to pay a debt by portions, and it follows as a corollary, that no partial transfer can be made by a creditor, so as to be binding on a debtor, even when notice is

The person who furnishes materials to the undertaker, has no action against the owner of the buildings, when he suffers the latter to pay according to his stipulation with the former, before suit is instituted.

No debtor is bound to pay a debt by portions, and no partial transfer can be made by a creditor, so as to be binding on a debtor, even when notice is given, except by the express consent of the latter.

The proprietor is not even obliged to accept a draft drawn on him by the undertaker, in favor of the material man, for a part of a payment which is to become due, nor

given, except by express consent of the latter. The proprietor in the present instance, was not bound to accept the draft of the undertaker; he refused positively to do so, and consequently he assumed no obligation in favor of the holder. Neither was notice of the transfer binding on him, being for a part only of the debt which might become due to the undertaker.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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STRAWBRIDGE

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TURNER &  
WOODRUFF ET AL  
to pay it then.  
He may pay the  
whole sum to  
the undertaker,  
when it is due,  
or when he re-  
ceives the work,  
unless suit is pre-  
viously brought.

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**STRAWBRIDGE vS. TURNER & WOODRUFF ET AL.**

**APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF  
NEW-ORLEANS.**

The owners of steam-boats are only liable for the delinquency and illegal acts of their captains and agents, which they might have prevented, and failed to do so.

The liability of principals for the acts of their agents, is not governed by the commercial law, but by the provisions of the *Louisiana* and *Civil Codes*.

This is an action to recover one thousand dollars in damages for the value of a slave, for which the plaintiff alleges the defendants are liable, as owners of the steam-boat Chesapeake.

The petitioner alleges, that the commander of the steam-boat employed by the defendants, took on board a slave named Stephen belonging to him, without his knowledge or consent, and employed him as a hand on a trip to Alexandria and elsewhere, until the 20th December, 1834, when he had the slave arrested on board of the boat, but in endeavoring to escape the latter fell or jumped overboard and was drowned.

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STRAWBRIDGE  
vs.  
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WOODRUFF ET AL

The defendants pleaded the general issue; and further averred, that even if said slave belonged to the petitioner and was lost as is alleged, they are not liable.

On the trial, after introducing testimony, when the cause was about to be submitted, the defendants' counsel moved the court to instruct the jury that "the owners of the boat were not liable, unless they knew of the illegal acts of the officers on board and could have prevented them." 8 *Martin, N. S.*, 503-5. This part of the instructions asked for was refused and a bill of exceptions taken.

At the request of the plaintiff, the judge told the jury the owners of steam-boats and vessels were liable for the acts of the master when they could have prevented them, and do not; *i. e.*, unless they use due diligence to prevent them; and it does not suffice to show they were not present at the time of the act; they are bound to give instructions to their agents and to pay reasonable and customary attention to prevent any illegal acts, and for this neglect they are liable.

The jury returned a verdict of eight hundred dollars for the plaintiff. From the judgment rendered thereon, the defendants appealed.

*Strawbridge, in propriâ personâ.*

*Preston*, for the appellants.

*Martin, J.*, delivered the opinion of the court.

The plaintiff instituted his suit against the defendants as owners of the steam-boat *Chesapeake*, to recover damages for the loss and value, of a negro man slave which he alleges they had employed as a hand on board said boat, without his knowledge and permission. It appears that when the slave was arrested and about to be carried away at the instance of the plaintiff, he jumped overboard and was drowned. There was a verdict and judgment for the plaintiff, from which the defendants appealed.

On the trial of this case the judge *a quo*, was requested by the counsel for the defendants to charge the jury, that the

defendants were not liable for the illegal acts of the officers of the boat, unless done with their knowledge, and which they could have prevented. The judge refused to give the charge as asked for, and a bill of exceptions was taken.

In the opinion of this court the charge should have been given. The Louisiana Code, article 2299, and the Civil Code of 1808, article 20, page 320-22, restricts "the liability of principals for the delinquency and acts of their agents in the functions in which they have employed them, and when the former could have prevented the delinquency and illegal acts of the latter, and have failed to do so." This renders it necessary to remand the cause for new proceedings in the court below.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, the verdict set aside and the cause remanded for further proceedings, with directions to the judge to instruct the jury "that no responsibility attaches to the defendants unless they might have prevented the act which occasioned the damages claimed, and have not done it." See *Palfrey vs. Kerr et al.*, 8 *Martin, N. S.*, 503-5. And it is further ordered that the plaintiff and appellee pay the costs of this appeal.

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June, 1835.

STRAWBRIDGE  
vs.  
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The owners of steam-boats are only liable for the delinquency and illegal acts of their captains and agents, which they might have prevented, and failed to do so.

The liability of principals, for the acts of their agents, is not governed by the commercial law, but by the provisions of the *Louisiana and Civil Codes*.

## CASES IN THE SUPREME COURT

EASTERN DIST.  
June, 1835.

WHITWELL  
ET AL.  
VS.  
CREHORE, EX'R.      WHITWELL, BOND & CO. VS. CREHORE, EXECUTOR, &c.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF  
NEW-ORLEANS.

A person who endorsed notes at the instance of the transferor, to enable him to raise money under an assurance that he was never to be liable, can avail himself of all the original equity against the subsequent holder who took them after their dishonor.

Where an endorser endorsed for the accommodation of the holders without receiving any consideration whatever, they cannot recover against him; nor their endorsee, who takes the note after its dishonor.

This is an action by the holders against the defendant, as executor of Caleb D. Jordan, deceased, who was endorser on five promissory notes, to render his succession liable for their several amounts. The notes are drawn by Jordan, Ellis & Co. to the order of Henry Jordan, by him endorsed, and by Caleb D. Jordan in blank, and also by Thomas K. Jones & Co. in blank. With these endorsements on each, the notes sued on are held by the plaintiffs.

The defendant avers the notes in question were endorsed by the deceased, C. D. Jordan, expressly for the accommodation of T. K. Jones & Co., merchants, to enable said firm to get the notes discounted in bank, and with the special understanding that Jordan was never to be liable on his endorsement to the said firm; that the drawers having failed, Jones & Co. took up said notes after they were dishonored, and who are now believed to be the true owners thereof; that the present holders received the notes after they were dishonored, well knowing the understanding between the late C. D. Jordan and Jones & Co., for whose accommodation and without any consideration they were endorsed by him.

The evidence established the averments in the answer of EASTERN DIST.  
June, 1835.  
 the defendant. The parish judge decided that even if the original holders, T. K. Jones & Co., were plaintiffs, they could not, under the circumstances, recover; and that the plaintiffs cannot, it appearing that they received the notes sued on after maturity and dishonor, subject to all the equity between the original parties. Judgment being given in favor of the defendant, the plaintiffs appealed.

*Maybin*, for the plaintiffs and appellants.

1. The plaintiffs are the sole owners of the notes sued upon, and gave a valuable consideration for them.
2. That the defendant has not established his defence that Caleb D. Jordan endorsed the notes sued upon under an agreement with Thomas K. Jones & Co.; and he should now be compelled to pay them.
3. That Henry Jordan, the brother, and an heir of the deceased, was properly rejected as a witness.

*Gray*, for the defendant.

1. The notes were drawn for a debt due from Jordan, Ellis & Co. to T. K. Jones & Co., and endorsed by the deceased, Jordan, at the request and for the accommodation of said T. K. Jones & Co.
2. The said notes were endorsed by T. K. Jones & Co. to the present plaintiffs sometime after they fell due, and are, therefore, liable to all equities subsisting between the deceased Caleb D. Jordan and the said T. K. Jones & Co. *Chitty on Bills*, page 126, and the cases there cited.
3. A note passed after being due, it being out of the common course of dealing, is such a suspicious circumstance as makes it incumbent on the party receiving it, to satisfy himself that it is a good one, and if he omit to do so he takes it on the credit of his endorser and must stand in the situation of the person who was holder at the time it was due. *Chitty*, page 126-7. *Banks vs. Caldwell*, cited 3 D. R. 81.
4. There is no proof of notice of protest to the deceased C. D. Jordan.

EASTERN DIST.  
June, 1835.

WHITWELL ET AL to recover the amount of five promissory notes drawn by  
vs. C. D. Jordan, Ellis & Co. to the order of Henry Jordan, and  
CREHORE, EX'R. endorsed by said Henry Jordan, C. D. Jordan and Thomas K. Jones & Co., successively. The plaintiffs allege that they are holders by endorsement from T. K. Jones & Co., and that C. D. Jordan, the defendant's testator, is liable to them as endorser.

The defence set up is, that C. D. Jordan endorsed the notes for the accommodation of T. K. Jones & Co. at their special request, in order to enable them to raise money at bank in Boston, and under a positive assurance that he should never be liable as endorser. It is further alleged, that the plaintiffs are not the *bond fide* holders of the notes sued on, and that they were received by them long after they were due, in order to enable them to recover for the benefit of T. K. Jones & Co., who took up the notes at their maturity, on the failure of the makers to provide for their payment. It is further alleged, that the notes were given by Jordan, Ellis &

A person who endorsed notes at the instance of the transferor, to enable him to raise money, under an assurance that he was never to be liable, can avail himself of all the original equity against the subsequent holder, who took them after their dishonor.

Judgment being rendered in favor of the defendant, the plaintiffs appealed.

The evidence in the record satisfies us, that the plaintiffs received the notes in question after they were dishonored; that they were taken from T. K. Jones & Co. as collateral security for a debt due by them to the plaintiffs, and consequently that the defendant can avail himself of all the original equity existing between his testator and T. K. Jones & Co.

The only question, therefore, is, whether Jones & Co. could recover of the present defendant; and we concur with the Court of Probates in the opinion that they could not.

It is clearly shown by the evidence, that C. D. Jordan

endorsed for their accommodation, without any consideration whatever. One witness, whose testimony is unimpeached, swears positively to the agreement between Jones & Co. and Jordan, that the latter should never be held liable as endorser; and as there is no evidence that he ever endorsed other notes, we consider the identity fully shown. Independently, therefore, of the testimony of Henry Jordan, which was rejected by the court below, on the ground of remote interest in the case, we think the defence is sustained.

EASTERN DIST.  
June, 1835.

HARRIS  
vs.  
DENISON ET AL.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Probate Court be affirmed, with costs.

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HARRIS vs. DENISON ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

If, from the tacit admissions of a vendee, that he had acquired no title to a certain slave in his possession, from the true owner, but that the sale to him was simulated, and permits a creditor of his vendor to seize and sell the slave in contest, at public sale, the purchaser will acquire a valid title thereto, without any suit to set aside the first sale.

This is an action of revendication to recover a slave in the possession of the defendant, Denison.

The plaintiff alleges he purchased the slave in question from F. Proctor, by public act, dated the 27th February, 1833; that said slave is detained by Mrs. Emily Denison, who refuses to deliver him up; and also, that he fears he will be ill treated. He prays to have the slave sequestered and decreed to be his property, &c.

Mrs. Denison averred, the slave in dispute belonged to the succession of her late husband, then in a course of administration in the Probate Court, to which tribunal she prays the case may be transferred.

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June, 1835.

HARRIS  
vs.  
DENISON ET AL.

Parker, the curator of Denison's vacant estate, intervened and claimed the slave for the succession of Denison; and that his widow was in lawful possession, in virtue of a bill of sale from one Gomez to her late husband, made before a notary, the 1st June, 1832, accompanied by delivery. He claims to have the slave delivered up, and three hundred dollars in damages sustained by the sequestration.

The plaintiff, in answer to the intervention of Parker, denied all the allegations in the petition, and further averred, that the pretended sale, under which Denison claimed the slave, was false, fraudulent and simulated, and that he is a possessor in good faith, &c.

Parker pleaded the prescription of one year against the averments in the answer to his intervention; that the sale of Gomez to Denison, dated the 1st of June, 1832, could not be attacked or rescinded for fraud, as more than a year had elapsed before any proceedings were taken in the matter.

Upon these pleadings, the parties went to trial. The evidence showed that the slave in question was sold by the city marshal, the 11th February, 1833, under a judgment obtained in the City Court by M. Harris *vs.* Gomez, when F. Proctor became the purchaser, and conveyed him to the plaintiff. It further appeared, that Denison himself brought the slave to the coffee-house and gave him up to be sold by the city marshal, and remained there until he was adjudicated to Proctor.

It was also in evidence, that at the time Gomez became embarrassed, he consulted, as to the means of preventing his creditors from seizing his property; and, finally, concluded to make a sale of it to Denison, who was then his foreman in a foundry. The slave in question was included.

In 1833, after this sale, the plaintiff claimed to have the slave given up, and Denison, who had him at work with him, admitted he belonged to the plaintiff, but could not spare him then, on account of his valuable services, and was willing to allow him liberal wages.

The district judge decided that the plea of prescription did not apply, as Denison was neither alleged nor proved to be a creditor of Gomez. That it was only a sale to a preferred creditor which must be attacked within a year; but, that a simulated sale might be assailed and set aside at any time. Judgment was rendered that the plaintiff recover the slave, with costs. The intervenor appealed.

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HARRIS  
vs.  
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*Sterrett*, for the plaintiff.

*Preston*, for the appellant.

*Mathews J.*, delivered the opinion of the court.

This is a petitory action in which the plaintiff alleges his title to a certain slave named in the petition, and claims to recover him from the defendant, in whose possession the property was, at the time of commencing suit. She, in her answer, does not set up title in herself, but avers that the slave in question belongs to the succession of her husband, which is administered by E. E. Parker, who intervened in the suit and claimed him for the benefit of said succession. Judgment was rendered in the court below, in favor of the plaintiff, from which the intervenor appealed.

The immediate title under which the appellee claims, is an act of sale from F. Proctor, who purchased the slave at a public sale made by the marshal of the City Court, in pursuance of an execution issued on a judgment which the plaintiff had obtained against one Gomez; the property being seized as belonging to the defendant in that case.

The title set up by the intervenor, in favor of the succession of John Denison, rests on a sale made by Gomez, of all his property to Denison, during the lifetime of these parties, they both being now dead. Amongst the property sold, the slave in dispute was included. On the validity of this sale, depends the claim of the appellant. It was considered as simulated when the seizure was made under the execution of the plaintiff. This took place when Denison was living, and the property was seized while in his possession, as belonging

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HARRIS

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to Gomez, and was willingly given up by the possessor, who was present at the adjudication made by the marshal, and made no objections to the propriety and legality of the proceeding.

If from the tacit admissions of a vendee, that he had acquired no title to a certain slave in his possession, from the true owner, but that the sale to him was simulated, and permits a creditor of his vendor to seize and sell the slave in contest, at public sale, the purchaser will acquire a valid title thereby, without any suit to annul the first sale.

The conduct of Denison, subsequent to the time when the plaintiff assumed the rights of an owner, under the sale from Proctor, as shown by the testimony, strongly corroborates the truth of the principles which we have assumed. The slave returned into his possession, and when demanded from him, on the part of the plaintiff, so far from setting up any claim of property, he agreed to pay him for the use of his services.

If we are correct in this view of the cause, all the doctrine on the subject of suits to annul contracts and prescriptions provided for them, relied on in favor of the appellant, may well remain unnoticed, as inapplicable to this case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.  
June, 1835.

**KERNION, SYNDIC, vs. JUMONVILLE DE VILLIER.**

**APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE  
THEREOF PRESIDING.**

**KERNION,  
SYNDIC,  
vs.  
JUMONVILLE DE  
VILLIER.**

Where A purchased one-fourth of a sugar plantation, and gave his notes in part payment to B and C, who remained joint owners of the other three-fourths, and when it was stipulated that B and C, the vendors, should pay three-fourths of a mortgage which they had previously given on the premises to the bank, and A pay the other fourth, and B and C fail, so that the mortgaged premises are seized and sold to pay off the mortgage: *Held*, that no recovery can be had against A by the vendors, on his notes, there being a failure of the consideration.

A failure of the consideration of a promissory note, by the misconduct of the payee, without the fault of the maker, will discharge the latter from his obligation.

This is an action to recover the amount of three promissory notes of one thousand dollars each, drawn by the defendant Gustave Jumonville de Villier, payable to the order of Charles François Coulon Jumonville de Villier. They were given for the price of one-fourth of a small sugar plantation, which the defendant purchased from Kernion and C. F. C. Jumonville de Villier, by public act, dated the 8th of March, 1832.

The plaintiff Kernion sues as syndic of his own creditors to recover the amount of these notes.

The defendant admitted the execution of the notes, but averred they were obtained through fraud and collusion, on the part of the payee and holder. That they were given in part payment of the one-fourth part of a sugar plantation which he purchased from the said Kernion and Jumonville, who falsely and fraudulently represented to him that they were free from debt, whereas, after converting the crops to the payment of their own debts, they suffered the plantation to be seized and sold by the Consolidated Association Bank, to pay a mortgage debt contracted before the sale to him.

**EASTERN DIST.** He avers the consideration of the note has failed, and prays  
*June, 1835.* judgment that the notes sued on be cancelled.

**KERNION,  
SYNDIC,  
vs.  
JUMONVILLE DE  
VILLIER.** The evidence showed that the defendant purchased one-fourth of a sugar plantation from Kernion and Jumonville, who remained three-fourth owners, by notarial act, dated the 8th March, 1832. That at the time the plantation was mortgaged by the vendors to the Consolidated Association Bank for eight thousand three hundred and seventy dollars, which it was agreed should be paid by all the joint owners proportionably, the defendant paying one-fourth. Kernion and Coulon Jumonville were greatly embarrassed by old debts and failed entirely to pay their proportion of this mortgage, and no part of it being paid, the bank on the 2d October, 1833, had the property seized and sold under the mortgage for seven thousand five hundred and fifty dollars, payable one year thereafter, with eight per centum interest.

It was also in proof, that the vendors of the defendant were insolvent at the time of the sale, and wholly unable to comply with its conditions on their part.

The cause was submitted to a jury, who returned a verdict for the defendant, which was confirmed by the judgment of the court. The plaintiff appealed.

**J. Seghers**, for the plaintiff and appellant, contended that there was no fraud shown, but, on the contrary, the mortgage debt of the vendors to the bank was expressly made known to the defendant, who agreed to pay one-fourth of it, giving the notes sued on for the balance of the price of his purchase.

2. The verdict of the jury does not charge fraud, and the evidence upon which they acted certainly does not justify the verdict. The case should, therefore, be remanded.

3. A vendee cannot charge his vendor with a fraudulent concealment of a fact when the latter has furnished the means of knowing it. *2 Martin, N. S., 619.*

4. Fraud requires the strictest proof, and he who alleges it must fully establish it by proof. It does not suffice that the evidence renders it probable. *10 Martin, 436.*

5. On a question of fraud if the court believe the verdict EASTERN DIST.  
erroneous, the case will be remanded for a new trial. 11  
*Martin*, 188. 6 *Louisiana Reports*, 697.

*Nicholls*, for the defendant.

On a question of fraud the court will respect the verdict and the judgment of the inferior court. 3 *Martin, N. S.*, 22.  
*Ibid.*, 365.

2. The vendors of the defendant were insolvent at the time of sale, and inveigled him to embark his whole fortune in a sinking concern, they knowing themselves that they were so.

3. The consideration of the notes completely failed. The very property for which they were given, was taken to pay a mortgage debt of the vendors, three-fourths of which they had stipulated to pay, as one of the conditions of sale, and failed.

*Mathews, J.*, delivered the opinion of the court.

This suit is brought on three promissory notes, made by the defendant, payable to the order of C. F. Coulon Junonville de Villier, and endorsed by him, &c., and are now in the hands of the plaintiff, as syndic of his own estate surrendered to his creditors.

The defendant pleaded a failure of the consideration for which the notes were given. The case was submitted to a jury, by whom a verdict was found for him; and judgment being thereon rendered, the plaintiff appealed.

It appears by the evidence of the case, that the notes in question were given in consideration of a purchase made by the defendant from the payee and endorser, as joint owners of a small sugar plantation, situated in the parish of Assumption, which was at the time of sale mortgaged to the Consolidated Association Bank, to secure the payment of a considerable sum of money. Under this mortgage the plantation was seized and sold, and the defendant consequently deprived of the enjoyment and property of the one-fourth part which he had purchased, without fault or neglect.

Where A purchased one-fourth of a sugar plantation, and gave his notes in part payment to B and C, who remained joint owners of the other three-fourths, and when it was stipulated that B and C, the vendors, should pay three-fourths of a mortgage, which they had previously given on the premises, to the Bank, and A pay the other fourth, and B and C fail, so that the mortgaged premises are seized and sold to pay off the mortgage: Held, that no recovery can be had against A by the vendors, on his notes, there being a failure of the consideration.

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on his part ; for although in the contract by which he became purchaser, he had assumed to pay one-fourth of the debt due by the mortgage to the bank, he could not have compelled the mortgage creditors to receive a part of the debt due to them ; and such payment, even if it had been made, would not have prevented the seizure and sale which subsequently took place, unless the other joint owners of the plantation had also paid their proportions of the debt. It appears, also, from the *bilan* filed by the plaintiff, that he was largely indebted at the time of sale ; and so was the payee of the notes, the other partner in the plantation, as shown by a schedule representing the state of his affairs. Under these circumstances which appear in the case, we are clearly of

A failure of the consideration of a promissory note, by the misconduct of the payee, without the fault of the maker, will discharge the latter from his obligation.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

## SAVINGS BANK OF NEW-ORLEANS vs. RICHARDS ET AL.

## APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The law requires notice of protest and non-payment of a promissory note, by the maker, to be given to the endorsers at the time ; and this notice must be alleged and proved by other evidence than the instrument of protest, or they will not be liable.

Where a judgment was given against the maker and endorsers of a promissory note, *in solido*, and it appearing the endorsers were not

liable, for want of legal notice of protest for non-payment, and where the maker had no cause of appeal: *Held*, that judgment be affirmed as to the latter, with ten per cent. damages, as for a frivolous appeal; and reversed and judgment of non-suit entered in favor of the former.

JUNE, 1835.

**SAVINGS BANK  
OF NEW-ORLEANS  
vs.  
RICHARDS ET AL.**

This is an action on a promissory note for four hundred and sixty-eight dollars, payable twelve months after date, drawn by E. Richards, and endorsed by J. Gontz, and C. Janin, given to the New-Orleans Savings Bank. When the note became due, it was protested for non-payment. The petition alleges, that due notice of protest was given to the endorsers.

The defendants pleaded a general denial.

On the trial, the note and protest were the only evidence produced by the plaintiff, in support of his demand.

Judgment was rendered against all the defendants *in solido*, from which they all appealed.

The endorsers relied on want of *notice* of protest to them, and the absence of any proof to that effect, in order to obtain a reversal of the judgment.

*Maybin*, for the plaintiff, prayed an affirmance of the judgment against the maker of the note, with ten per cent. damages, as for a frivolous appeal.

*Morphy*, for the appellants.

*Bullard, J.*, delivered the opinion of the court.

This is an action against the maker and endorsers of a promissory note. The defendants pleaded a general denial; and judgment being rendered against them *in solido*, they appealed. Both the clerk and the judge certify, that the record contains all the evidence adduced on the trial, in the first instance. That evidence consists entirely of the note, as set forth in the petition, together with a regular protest. It is sufficient to establish the liability of the maker, but there is no evidence whatever in the record, of any notice to the endorsers, of non-payment, before the institution of this suit, nearly three months after the protest.

The law requires notice of protest and non-payment of a promissory note, by the maker, to be given to the endorsers at the time; and this notice must be alleged and proved by other evidence than the instrument of protest, or they will not be liable.

Where a judgment was given against the maker and endorser

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of a promissory note, *in solidis*, and it appearing the endorsers were not liable, for want of legal notice of protest for non-payment, and where the maker had no cause of appeal: *Held*, that judgment be affirmed as to the latter, with ten per cent. damages, as for a frivolous appeal, and reversed; and judgment of nonsuit entered in favor of the former.

The law is two well settled to require any reference to authorities, that, without alleging and proving such notice to the endorsers, or something equivalent, they are not liable to the holder.

The appellee has prayed an affirmance of the judgment, with ten per cent. damages, as for a frivolous appeal. As it relates to the maker of the note, who does not pretend to have any defence, we think the damages ought to be allowed; but, as it relates to the endorsers, the judgment must be reversed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, so far as concerns the defendant, E. Richards, be affirmed with costs, and ten per cent. damages; and that the judgment against Joseph Gontz and Charles Janin, be annulled and reversed, and ours is in their favor, as in the case of a non-suit, with costs as to them in both courts.

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#### DUFUAU ET UX. vs. LATOUR ET AL.

##### APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF ST. CHARLES.

So long as an act of partition, passed before the parish judge, in his capacity of notary public, setting out the net amount of the estate, and the distributive share of each heir, and signed by each, remains in force, and not rescinded, an action of partition by an heir, against his co-heirs, to provoke a new partition, will not lie.

The partition made by the notary, must govern, as to the share of each heir; and if any of them received more than their share, at the sale of the estate, an action will lie in favor of the other heirs, to recover and equalize the shares, in courts of ordinary jurisdiction.

This is an action of partition. The plaintiff's wife instituted suit against André Latour, the surviving husband of her deceased mother, and the other children, to have the property of her succession partitioned, and the share of each heir set off, according to law.

The defendants excepted to the plaintiffs' action; that a partition between the present parties had already been made, before the parish judge, acting as notary public, at the instance of the present plaintiffs, which can be opposed or attacked, only by way of opposition.

The probate judge, on these pleadings sustained the exception. From this judgment, the plaintiffs appealed.

*Nicholls*, for the plaintiff.

*Pichot, contra.*

*Bullard J.*, delivered the opinion of the court:

The plaintiff alleges that she is one of the heirs of Pouponne Darembourg, deceased, wife of André Latour; that the formalities required by law, for the liquidation and settlement of the succession, were duly complied with by the sale of the property held in community; that André Latour, Pierre Latour, and Prosper Latour, purchased the greater part of the property on long credits; that the succession has never been settled, and that the interests of the heirs require that a partition and final settlement be made. She prays that the surviving husband and all her co-heirs may be cited; that a partition and final settlement be made, and that she may have judgment for her share.

Two of the heirs excepted to the action, on the ground, that the partition now prayed for, had already taken place, and the share coming to each, ascertained by deed or act passed before the parish judge, acting as notary public, at the request of the plaintiffs; and that said partition could be attacked only by way of opposition, and that plaintiffs could claim only a specific sum, thus ascertained.

This exception was sustained, and the plaintiffs appealed.

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LATOUR ET AL.

So long as an act of partition, passed before the parish judge, in his capacity of notary public, setting out the net amount of the estate, and the distributive share of each heir, and signed by each, remains in force and not rescinded, an action of partition,

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by an heir against his co-heirs, to provoke a new partition, will not lie.

The partition made by the notary, must govern, as to the share of each heir, and if any of them received more than their share, at the sale of the estate, an action will lie in favor of the other heirs, to recover and equalize the shares, in courts of ordinary jurisdiction.

The act of partition relied on in support of the exception, recites, that "the surviving husband and the heirs, properly represented, appeared before the notary, who was the same judge of probates, in pursuance of previous notice, and that the notary proceeded to open the present *procès verbal* of partition." It then sets forth the net amount of the estate, in money, after deducting the charges, and concludes by exhibiting the distributive share of each of the heirs. It appears to be signed by all parties interested, the married women duly represented by their husbands.

We are of opinion, that the Court of Probates did not err in sustaining the exception! While this act remained in force, and not rescinded, no new partition could be provoked. The parties are to be governed by it, as to the shares they are respectively entitled to; and if any of the heirs have received more than their share, at the sale of the estate, their co-heirs are entitled to an action to enforce the contract and to equalize the shares in courts of ordinary jurisdiction.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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HICKS, ADMINISTRATOR, vs. POPE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The law of the domicil of a persons inheriting, will govern in relation to the rights of the inheritance.

So where a slave is inherited by the wife from her father, in Alabama, which if reduced to possession by her husband, domiciled there, would have become his absolute property; but the domicil of the husband and wife being in Louisiana at the time, every thing falling by inheritance to the wife, becomes her separate property.

This is an action of revendication. The plaintiff as administrator of the succession of the late Reddin Pope, claims a mulatto girl, slave, which he alleges belongs to the estate he administers, and is now in the possession of the defendant, the widow of the deceased, which she claims as her own separate property.

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The evidence shows that Reddin Pope married Eliza Youngblood, (the defendant) in the state of Alabama, where they resided several years and then removed to Louisiana. After their removal to this state, the father of the wife died in Alabama, and the slave in question was allotted to her as her portion of the inheritance, and brought to Louisiana, where she remained until the death of the husband.

The administrator claims the slave as making part of the husband's estate. The defendant retains her as her individual and separate property, which she inherited from her father, since she has resided in this state.

It is admitted slaves are personal property in Alabama, where the common law prevails, and that when reduced to possession, become the property of the husband.

Judgment was rendered in favor of the defendant. The plaintiff appealed.

*Lawrence* and *Winthrop*, for the plaintiff, contended, that as the slave was acquired in Alabama, where, on being taken into possession by the husband, was his absolute property, the laws of that state should govern in determining the rights of the parties in this case. *5 Martin, N. S.*, 569. *7 Ibid.*, 41. *2 Kent's Commentaries*, 426. *Story's Conflict of Laws*, 312.

*Preston, contra.*

*Mathews, J.*, delivered the opinion of the court.

In this case the plaintiff as administrator of the succession of Redden Pope, claims to recover from the defendant a female slave in her possession, as making a part of the estate of the deceased, who was her husband by a marriage contracted in the state of Alabama. There was judgment

EASTERN DIST. for the defendant in the court below, from which the plaintiff appealed.  
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The facts of the case are as follows: the deceased married the defendant in Alabama; in that state slaves are personal property, and by its laws the husband *ipso facto* by marriage, acquires a complete right and title to all the personal property of his wife. The married parties moved from the place of their marriage to the state of Louisiana, and were here domiciled at the time of the death of the father of the wife, who died in the former state; and the slave in question was

The law of the  
domicil of persons inheriting,  
will govern in  
relation to the  
rights of the in-  
heritance.

inherited from him by the defendant; was brought into this state previous to the death of the husband, and remained in his possession as head of the family until his death; but, from that period has been held by his widow who now claims title by inheritance from her father.

These facts present a question arising *ex conflictu legum*. According to the laws of Alabama where the father was domiciled, and where the property was at his death, if it had been reduced to possession by the husband it would have been his absolutely, had that place been the domicil of him and his wife. But they had changed it to the state of Louisiana, according to the laws of which, every thing falling by inheritance to the wife became her separate property. Which of these laws must govern and control the rights of the parties? Those of the place where the succession was opened, or those which prevail in the place of the domicil of the heir?

We are of opinion that the rule of our decision must be taken from the latter. It has been long settled by the jurisprudence of this country, that notwithstanding marriages may have been contracted in other states, the rights of the married persons after being domiciled in this, are governed by its laws in relation to all property acquired during their residence here, so far at least, as they have reference to *acquests and gains* which form the matrimonial community. If a husband and wife be placed in this category and the first should acquire personal property by purchase in another

state, it would, perhaps, at the moment of acquisition form a part of the matrimonial community, even before it was brought into the place of the domicil of the partners. This doctrine is a necessary consequence of the maxim adopted by eminent civilians that *in domicili loco mobilia intelligantur existere.*

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The maxim thus adopted, although expressed in various phraseology by different writers, seems to be received as well founded by them all, notwithstanding the doubts and perplexities which are found in making a clear distinction between statutes real and those which are personal. See *Story's Treatise on the Conflict of Laws*, page 308 *et sequentes.*

If this rule be sound in relation to personal property acquired by purchase, we can see no good reason why it should not be considered as equally sound and valid in relation to that which may be acquired by inheritance, and its destination be directed by the laws of the domicil of the heir.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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MILLAUDON vs. ATLANTIC INSURANCE COMPANY.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF  
NEW-ORLEANS.

Where the plaintiff took out a policy of insurance against fire, "on his goods, *stock in trade*, &c.": Held, that the policy covered goods in stores bought on joint account and sold for the mutual profit of the insured and another person, the former being also in advance on the adventure: Held, also, that the insurer was absolute owner of one-half of the goods in the store, had an insurable interest in them as "*stock in trade*," and also to cover his advances on the whole stock.

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This is an action on a policy of insurance against fire, subscribed by the defendants. The plaintiff alleges he took out a policy of insurance, in the office of the defendants, on the 2d of September, 1834, insuring him from loss or damage by fire, "on goods, being stock in trade, on consignment, or held in trust," contained in five tenements or stores, on the corner of Commerce and Julia streets. That said stores and goods therein were destroyed by fire on the night of the 25th of October following, during the continuance of the policy, in consequence of which he sustained a loss of ten thousand dollars, in the destruction of the goods insured, for which the defendants are liable, according to an annexed account.

The defendants excepted to the action, on the ground that the matter in dispute was not submitted to arbitrators, according to the terms of the policy, and denied that they ever refused such submission, but that they are and were ready to do so.

In their answer, the defendants deny that the plaintiff sustained any loss or damage covered by said policy; that the goods alleged to have been in store and destroyed, were not in fact *in said stores* at the time of the fire, nor owned by him, held on consignment or in trust; and if they were, which is denied, the said policy does not cover them, because of the non-compliance with the first article of the conditions of insurance.

Upon these pleadings the parties went to trial. Such facts as are deemed material to a clear understanding of the points of law discussed, are extracted from the case below.

The policy upon which suit is brought, stipulates as follows:

"That Laurent Millaudon has paid the sum of fifty dollars to the Atlantic Marine and Fire Insurance Company, for insurance against fire, (according to the tenor of the conditions annexed) not exceeding in each case the sums herein-after recited, upon the property herein described in the places herein set forth, and not elsewhere, &c., *on goods, being stock*

*in trade*, or on consignment, or held in trust, contained in five tenements, situated at the corner of Commerce and Julia streets, in New-Orleans, No. —, twenty thousand dollars."

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"CONDITIONS."

"*Article 1.* Persons applying for insurance on buildings, are to deliver into the office the following particulars, viz: of what materials the walls and roof of each building are constructed, as well as the construction of buildings contiguous thereto; whether the same are occupied as private dwellings, or how otherwise; where situated, also the name or names of the present occupiers. A separate sum must be insured on each building, and if there should be any other building or dependency on the lot than those described, then such building or dependency is not covered by this policy, even though the same be connected with the building described.

In the insurance of goods, wares or merchandise, distinct sums should be specified under the following heads: stock in trade and utensils, household goods and linen, &c.; also, whether such goods are of the kinds denominated *hazardous*, and whether any manufactory is carried on in the premises, and if any person or persons shall insure his or their buildings or goods, and shall cause the same to be described in the policy otherwise than as they really are, so as the same be charged at a lower premium, such insurance shall be of no force. Pitch, tar, turpentine, saltpetre, gunpowder, flax, hemp, oil and tallow, are denominated *hazardous*.

"*Article 2.* Goods held in trust, or on commission, are to be insured as such, otherwise the policy will not cover such property."

The evidence showed that the goods in question were purchased by William T. Thompson & Co. (Thompson & Millaudon,) and the money furnished by Millaudon to pay off the notes. The notes were drawn by Thompson to the order of Millaudon and by him endorsed and paid, and the

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amount passed to Millaudon's credit. It was stated in the books of Thompson, "*Adventure in co. with Laurent Millaudon.*" That the prices charged in the account annexed to the petition, were the current price for which the merchandise destroyed, sold at the time. This account was proved by witnesses. The amount due for loss claimed is nine thousand three hundred and ninety-four dollars seventy-four cents. The same amount being also claimed from the Mississippi Insurance Company, where an insurance on the same goods was also effected.

The cause was submitted to a jury, under a charge from the judge presiding, which was excepted to by the defendants. The jury returned a verdict for the plaintiff for the sum claimed. From judgment rendered thereon, the defendants appealed.

*J. Slidell*, for the plaintiff.

1. The rules regulating the contract of indemnity in fire insurance are the same as in marine insurance. 5 *Johnson's Rep.*, 373. *Phillips on Insurance*, page 320. *De Forrest vs. the Fulton Fire Insurance Co.*, 1 *Hall's Rep.* 84, 111, 113. The plaintiff had clearly an insurable interest to the full value of the goods under the terms of the policy, which covered goods held on trust, but if there can be any doubt on this subject, all the authorities concur in stating that every person having a lien has an insurable interest to the extent of that lien in this case. Millaudon having paid for all the goods which were placed in a warehouse belonging to himself and entirely subject to his control, is entitled to secure the full value of the goods. *Phillips on Insurance*, page 41, 43, 44, 45. 1 *Peters's Rep.* 163. 13 *Massachusetts Rep.* 65. 1 *Hall*, page 102, 126, 127.

2. The value of the goods destroyed was a question of fact which was properly referred to the jury. Their verdict is fully sustained by the evidence. This court, in conformity with its repeated decisions, will not interfere with it unless manifestly erroneous.

*Peirce and Sterrett*, for the defendant.

1. The evidence of plaintiff proves neither the amount of the goods nor their value. The testimony of defendant disproves any presumption that might arise from the statement of the book-keeper, who testified to the account and the purchase and loss of the goods.

2. The insurance being made on the same interest as was made in the Mississippi Insurance Company, if fully indemnified by the latter, he has no recourse; however, the Mississippi Insurance Company may have.

3. By his statement he has settled for all but a little over three thousand dollars, if he has insured but his own interest in the goods, to wit: one-half of the amount he claims.

4. He insured but his own interest; this was all his stock in trade.

*Bullard, J.*, delivered the opinion of the court.

The present action is brought upon a policy subscribed by the defendants, by which they undertook to insure the plaintiff from loss by fire, on goods, being stock in trade, on consignment, or held in trust, contained in five tenements situated at the corner of Commerce and Julia streets, twenty thousand dollars, the same sum having been previously insured on the same, at the Mississippi office.

The defendants, after setting up an exception, which was overruled, and which we will notice afterwards, deny that the plaintiff has sustained any loss or damage covered by the policy; and aver, that the goods stated by him to have been in the stores, at the time of the fire, were not, in fact, there; that they were neither owned by him nor held on consignment, or in trust; and that, even if they were, which is denied, the said policy does not cover them for non-compliance with the first article of the insurance.

It is shown, that the goods alleged to have been destroyed by fire, were purchased on the joint account of the plaintiff and William T. Thompson, to be sold by Thompson, with the consent of Millaudon, who were to participate in the profits of the adventure; and that Millaudon was largely in

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Where the plaintiff took out a policy of insurance against fire "on his goods, stock in trade, &c.;" Held, that the policy covered goods in stores, bought on joint account, and sold for the mutual profit of the insured and another.

EASTERN DIST. *June, 1835.* advance to the concern, by money paid on account of the purchases. One-half of the goods must, therefore, be considered as the absolute property of the plaintiff, and he

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ther person, the former being also in advance on the adventure : Held, also, that the insured was absolute owner of one-half of the goods in the stores ; had an insurable interest in them, as "stock in trade," and also to cover his advances, on the whole stock. *1 Phillips on Insurance, 41 et seq.*

The amount of the property destroyed, is, perhaps a matter of more doubt ; but that question was left to a jury, whose finding we do not feel at liberty to dispute, unless manifestly wrong. Although the evidence in the record does not make it very clear, yet the verdict was satisfactory to the judge before whom the trial was had, and who refused a new trial, and its correctness depending on the credit to be given to particular witnesses, it must be respected by this court.

With respect to the exception first set up by the defendant, that, according to the ninth condition of insurance, the plaintiff was bound, before instituting suit, to tender an arbitration, we are of opinion, that when the claim was made by the plaintiff for the loss, if the defendants had offered to refer the question to arbitrators, the plaintiff would have been bound to accept it. But, on the refusal of the defendants to pay, without seeking to avail themselves of the right given by that article, the plaintiff might well commence suit without any previous offer to arbitrate, as the defendant must be considered as having waived it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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FOUCHER ET AL.

FOLLIN vs. FOUCHER ET AL.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF  
NEW-ORLEANS.

Where a juror is discharged and another one substituted and sworn in his place, after the trial has commenced and part of the evidence introduced, the plaintiff is entitled to open his case again to the jury and the trial to proceed *de novo*.

This is an action instituted by the plaintiff against the defendants A. Foucher and M. Andry, as endorsers on the following promissory note :

*"Le quinze Mai prochain je payerai à l'ordre de Mr. A. Foucher, à la Banque Consolidée, cinq mille piastres, valeur reçue."*

*"Nouvelle-Orléans, le 2 Novembre 1833."*

**"A. FOUCHER, Jr.**

Endorsed. *"A. Foucher,"* Manuel Andry, Ch. Follin."

The defendants Foucher and Andry severed in their answers, but both of them disavowed their signatures on the back of the note, and averred they were forged and counterfeited.

The plaintiff filed a supplemental petition, alleging that the endorsement of M. Andry is genuine, but even if proved not to be genuine, said Andry is liable, because he well knew that Antoine Foucher, Jr., was in the habit of forging endorsements in his (Andry's) name on notes drawn by him, and that he, the said Andry, permitted this use to be made of his name.

Upon these pleadings the parties went to trial. The cause was put before a jury and after it had proceeded and a portion of the testimony introduced, one of the jurors was discharged by order of the court for cause shown on record,

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and another substituted in his place and sworn. The plaintiff's counsel insisted on opening the case *de novo*. The court refused, and ordered the testimony which had been taken down to be read to the jury; allowing, however, if preferred by the parties, the witnesses who were still in court, to be re-examined *viva voce* by the party who introduced them. The plaintiff's counsel excepted to the opinion and decision of the court. The trial proceeded to its close, when the jury returned a verdict for the defendants. From judgment rendered thereon, the plaintiff appealed.

*J. Slidell*, for plaintiff and appellant.

1. The judge erred in discharging the juror under the circumstances stated in the bill of exceptions. Having been sworn without objection, examination or challenge, he could not be discharged without the consent of both parties. *Code of Practice, article 499, 507, 509 514, 515. 3 Bacon's Abr. 764. 7 Cranch, 290. 4 Blackstone's Commentaries, 346. 2 Bay's Rep., 150.*

2. The judge erred in compelling plaintiff to submit the testimony which had been taken before the juror was withdrawn; he should have been permitted to commence his cause *de novo*. A jury is in its nature one and indivisible. Any change in its constitution by the substitution of a different individual for a juryman withdrawn, renders it a new jury.

3. The testimony shows conclusively, that the defendant knew that his endorsement had been forged by Foucher, at a period anterior to that at which plaintiff became possessed of the note sued on, and that when applied to for the purpose of discounting it, he gave no intimation of the fraud. His silence under these circumstances was a fraud, which renders him responsible for the debt. *Louisiana Code, article 2294-5, 2307. 11 Toullier, page 157, 214, 259. 9 Ibid., 270-1. 6 Ibid., 90-1.*

*De Armas and Soulé, contra.*

*Martin, J.*, delivered the opinion of the court.

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In this case, after the trial had proceeded before the jury, and part of the evidence had been received, a juror was discharged and another one substituted and sworn in his place. The plaintiff's counsel insisted on opening the case again, but the court refused to permit him to do so, and a bill of exception was taken.

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vs.

GARDERE, SYNDIC

Where a juror is discharged, and another one substituted and sworn in his place, after the trial has commenced, and part of the evidence introduced, the plaintiff is entitled to open his case again to the jury, and the trial to proceed *de novo*.

We are clearly of opinion that the court should have suffered the counsel to open the case. What had preceded the swearing in of the last juror was a mis-trial. As soon as he was sworn the trial began *de novo* and ought to have been commenced by the plaintiff's counsel opening his case to the jury. *Code of Practice*, 476, 546.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, the verdict of the jury set aside, and the case remanded for further proceedings according to law; the defendants and appellees paying the costs of the appeal.

**PETERS & MILLARD, AND OTHER CREDITORS OF N. A. BARON'S SUCCESSION vs. GARDERE, SYNDIC.**

**APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF NEW-ORLEANS.**

After the dissolution of a firm, neither partner can bind the other without his authority, which must not be derived from their former relations as partners, but by the contract of mandate, and letter of procuration.

Where the procuration to a partner, from his co-partner, is contained in the act of dissolution of the partnership, and authorises the mandatory to settle up and exhibit a balance sheet of their concern, it will not confer authority to represent the other partner and the firm in a *concurso*, and vote for syndics on a claim of the partnership.

**EASTERN DIST.** But, admitting the act of procuration gave the power to a partner to represent a debt of the firm in a *concurso*, and vote for syndics; yet, when, the other partner attended and voted, it will be viewed as a revocation of the delegated authority.

**PETERS & MILLARD ET AL.**  
*vs.*  
**GARDÈRE, SYNDIC**

The appointment of a syndic is to constitute a new mandatory, in relation to the particular debt due by the insolvent, and a partner must have expressly delegated his authority to another, to be deprived of the right of voting personally, so far as his own interest is concerned.

The testamentary executors of the late N. A. Baron, deceased, presented their petition to the Probate Court, alleging that the term of their appointment had expired, and they were unable to give the requisite security for a renewal of their office; that, owing to the pressure of the times, it was impossible to sell without sacrifice, the immovable property left by the deceased; and that most of the debts of the estate had been paid by the late firm of Baron, jun. & Co., who are now creditors of said estate, in the sum of fifty thousand seven hundred and eighty-nine dollars eighty-six cents; that there are other debts which exceed in amount the unsold property of the estate, and that no persons entitled by law, will take the administration thereof; they, therefore, pray that a meeting of creditors be convened before a notary, for the purpose of deliberating on the affairs of the estate.

A meeting of creditors was accordingly ordered by the Court.

Mrs. Laure Bringier, widow of the late N. A. Baron, appeared at the meeting and declared she was a partner of the firm of Baron, jun. & Co.; and that said firm was a creditor of the estate of her deceased husband, N. A. Baron, in the sum of fifty thousand seven hundred and ninety-eight dollars eighty-six cents, in which she is interested; and that she voted for F. Gardère as sole syndic of said estate.

John B. Leefe, acting as the liquidator of the firm of Baron, jun. & Co., also appeared and claimed the right of voting in preference to the widow Baron, on the same claim, and votes for S. J. Peters and Andrew Hodge, jun., as syndics.

Mrs. Baron also appeared and voted on a claim of her own, for the restoration of her dotal effects, amounting to twenty-six thousand nine hundred and seventeen dollars forty-one cents, and for F. Gardère as sole syndic.

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Peters & Millard, creditors of N. A. Baron, opposed the votes of the widow Baron, alleging that she was no creditor for the sum stated by her in her own right, and that she had no authority to vote as a partner of the firm of Baron, jun. & Co., the same claim having been voted upon by J. B. Leefe, as liquidator of the firm.

They pray that her vote be stricken out, and that S. J. Peters and A. Hodge, be declared the syndics of said estate.

Leefe also opposed Mrs. Baron's vote, alleging that she had given him full power to liquidate and settle the affairs of the firm of Baron, jun. & Co., and he alone had the right to vote on said claim; and that he had exercised his power by voting without opposition, and his mandate could not afterwards be recalled.

Upon these pleadings the cause came before the court.

The only evidence in the case is the agreement entered into and signed by the widow Baron and J. B. Leefe, on the 27th May, 1834, relative to the dissolution and settlement of the firm of Baron, jun. & Co.; it is in the following terms:

"The undersigned hereby agree to dissolve, and do hereby dissolve, from and after this day, the co-partnership formed by them on the 13th June last, under the style of Baron, jun. & Co., for the purpose of carrying on business on their own account, and of closing that of the late N. A. Baron, jun., Esq."

"The undersigned J. B. Leefe is to take charge of the settlement of the affairs of our late concern, and exhibit a balance sheet, showing the situation of our business, so soon as may be practicable."

"The affairs of the late N. A. Baron, jun., Esq., so far as they have been under our management, as liquidators of his estate, are to be referred to the executors of that estate."

The judge of probates was of opinion that it was not the intention of the parties in this agreement, that J. B. Leefe

**EASTERN DIST.** should be the liquidator of the firm, but that he was only to wind up the accounts and make out a balance sheet, exhibiting the situation of the concern.

**PETERS & MIL-LARD ET AL.**  
vs.  
**GARDERE, SYNDIC**

It was ordered, adjudged and decreed, that the oppositions be set aside, and that F. Gardère be recognised as syndic of the creditors of the estate of the late N. A. Baron, jun. The opposing creditors appealed.

*Peirce*, for the appellants.

*Morphy and Grailhe, contra.*

*Bullard, J.*, delivered the opinion of the court.

The sole question presented for our solution in this case is, whether J. B. Leefe, one of the late firm of Baron, jun. & Co., was authorised to represent his late partner, the widow Baron, at a meeting of the creditors of N. A. Baron's estate, and to vote for the appointment of a syndic, contrary to her wishes.

The opposing creditors, who appealed from the judgment of the Probate Court, dismissing their opposition, contend, that he derived such authority from the act of dissolution of the firm, which contains the following clause: "The undersigned J. B. Leefe, is to take charge of the settlement of the affairs of our late concern, and to exhibit a balance sheet, showing the situation of our business, so soon as may be practicable."

It seems to us clear, that after the dissolution of the firm, neither party could bind the other, without his authority. That authority must be derived, not from their former relations as partners, but from a new contract or agreement between them. Such contract is essentially that of mandate. The agreement must, therefore, be considered as a procuration, and Leefe was authorised to represent his late partner in the settlement of the affairs of the late concern. But, as agent representing the separate interests of his late partner, his authority might be revoked by her at will, and he was bound by her instructions. Both the parties appeared at the

But admitting the act of procuration gave the power to a partner, to represent a debt of the firm

meeting of the creditors, and both voted. Admitting that *EASTERN DIST.  
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*BEAL**v.s.**M'KIERNAN.*

means so clear that he was thereby authorised to represent his late partner in a judicial proceeding, having for its object the appointment of new representatives of both partners, relative to that particular debt. The Code requires that the power should be express and special, for many specified purposes, and "in general, when things to be done are not merely acts of administration, or such as facilitate such acts." *Article 2966.* To appoint a syndic, is to constitute a new mandatory in relation to the particular debt due by the insolvent. Although we are not prepared to say that a liquidator of a commercial firm is without authority to represent all the partners in the appointment of a syndic; yet, in this case, we concur in opinion with the court below, that Mrs. Baron had not deprived herself of the right to appear personally and vote, so far as her own interest was concerned.

in a *concurso*, and vote for syndics, yet when the other partner attended and voted, it will be viewed as a revocation of the delegated authority.

The appointment of a syndic is to constitute a new mandatory, in relation to the particular debt due by the insolvent, and a partner must have expressly delegated his authority to another, to be deprived of the right of voting personally, so far as his own interest is concerned.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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**BEAL vS. M'KIERNAN.**
**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

Interest will not be allowed on an unliquidated demand, even when sanctioned by a jury of merchants on a mercantile claim.

The defect in the mode of executing a contract does not annul it; it only gives the other party the right of repudiating it, but which he may ratify and carry into execution, and thereby cure the defect.

EASTERN DIST. Where the verdict is given in sterling money, and the rate by which to reduce it to United States currency is proven, it is the duty of the court to reduce the sum to, and record the verdict in United States money.

BEAL  
vs.  
M'KIERMAN.

The plaintiff instituted suit against the defendant to recover the sum of three thousand eight hundred and nine dollars fifteen cents, the amount of loss on a purchase and shipment of cotton, made at the request and in obedience to an order from the latter.

The defendant resisted the plaintiff's demand on the ground, that the latter violated his orders with a view of benefiting himself at the expense of the defendant, by shipping *his own cotton* instead of purchasing it fairly, as he was bound to do by mercantile usage and law. On these issues the case went to the Supreme Court, and the decision was against the plaintiff. See 6 *Louisiana Reports*, 407.

On the trial, the question was raised, that the defendant had by his acts and conduct ratified the acts and purchases of the plaintiff; and thereby became bound by the said contract and liable to pay the loss claimed.

On the return of the cause to the Parish court, it was submitted to a jury of merchants, who after hearing the evidence returned the following verdict:

"The jury in this case find a verdict for the plaintiff for the sum of three thousand eight hundred and nine dollars fifteen cents, with interest from judicial demand, *less* twenty-five pounds, fifteen shillings and three pence sterling."

From judgment rendered in conformity to the verdict, the defendant appealed.

*Strawbridge, Gray and Conrad*, for the plaintiff.

*Hennen*, for the defendant and appellant.

1. The charge of the court to the jury, to which there is a regular bill of exception, was erroneous. The former judgment of the Supreme Court in this case, determined that there was no contract of sale between the parties on the facts disclosed in evidence. There was nothing to bind the parties. The pretended sale was absolutely null and void;

but, the court charged the jury that the defendant might by subsequent acts ratify such a null contract. This is in direct opposition to the principle of law found in 27 *Merlin's Rep.*, page 90; *verbo "Ratification."*

2. Should this court, however, be with the defendant on neither of these points, then, *he calls their attention to a manifest error in the verdict and judgment, to his prejudice.*

*The demand is unliquidated:* so much so, that a deduction is made by the jury in their verdict from the claim set up by the plaintiff. The whole sum claimed in the petition was not due to him; but the verdict and the judgment condemn the defendant to pay interest on this unliquidated demand from the judicial demand. The Code of Practice, however, says, article 554, "no interest shall be allowed on accounts or unliquidated claims." Repeated decisions of this court have reversed judgments of the inferior courts, where interest has been allowed. 6 *Martin, N. S.*, 10, *et passim.*

3. The judgment, therefore, should be reversed for this error; but a deduction is to be made from the amount of the verdict of the part in sterling money. Now, how is this court to ascertain the amount of this deduction, without evidence of the value of this deduction calculated in dollars and cents, the legal currency of the United States? Is not the verdict, therefore, uncertain? And should not the cause be sent back to make it certain?

*Martin, J.*, delivered the opinion of the court.

This case was remanded from this court last year, for new proceedings. See 6 *Louisiana Reports*, 407.

The cause was tried by a special jury of merchants. On hearing the evidence, the jury returned a verdict (being the second time) for the plaintiff, and from judgment rendered thereon the defendant appealed.

The counsel for the appellant contends that the judgment must be reversed, because it allows interest on an unliquidated demand.

2. Because the verdict allows a credit in sterling money, without reducing it to the current money of the United States.

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vs.  
M'KIRKMAN.

EASTERN DIST.  
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DEAL  
vs.  
M'KIERNAN.

Interest will  
not be allowed  
on an unliquidated  
demand, e-  
ven when sanc-  
tioned by a jury  
of merchants, on  
a mercantile  
claim.

3. Because the district judge gave an erroneous charge to the jury, and refused to give a legal opinion required by the counsel for the defendant.

4. Because the verdict is contrary to the law and evidence of the case.

It is clear that the claim is an unliquidated one, and that interest was improperly and illegally allowed by the verdict and judgment.

The judge charged the jury correctly. He told them, that although the plaintiff's claim might very properly have been resisted by the defendant, because the former had filled the order given him by the latter to purchase for his adventure a certain quantity of cotton, with cotton of his own as that of other persons, which he had on hand to sell; yet, if the jury were of opinion, from the evidence, that the defendant, knowing this, had ratified this act of the plaintiff, the former was bound by it; that this ratification need not be express, but may result from the conduct or even silence of the party; and that it results from such circumstances as clearly show his intention not to repudiate, but to approve and sanction the contract.

The judge correctly refused to instruct the jury that an act absolutely null, could not be the subject of a ratification.

This proposition had no bearing on the present case. The defect in the mode of executing the contract did not annul it, but gave to the defendant the right of repudiating it. If, instead of doing so, he chose to carry it into execution, he thereby ratified and cured the defect and adopted the contract.

The verdict, in our opinion, is supported by both the law and the evidence.

The pound sterling being worth four dollars and eighty cents in current money of the United States, according to a late act of Congress, the sum stated by the verdict in sterling money might have been on the application of the party, reduced by the court below to the currency of the United States, and this, it is our duty to do.

Where the verdict is given in sterling money, and the rate of it reduced to United States currency, is proven, it is the duty of the court to reduce the sum to, and record the verdict in United States money.

The jury have found the defendant entitled to a credit on the plaintiff's demand of twenty-five pounds fifteen shillings and three pence, sterling money, worth one hundred and twenty-three dollars thirty-two cents, in United States currency. The verdict is for three thousand eight hundred and nine dollars fifteen cents, from which this credit must be deducted, which leaves three thousand six hundred and eighty-five dollars eighty-three cents, as the sum due to the plaintiff and for which he is entitled to judgment.

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PLACENCIA'S  
HEIRS  
vs.  
PLACENCIA ET AL.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that the plaintiff do recover from the defendant the sum of three thousand six hundred and eighty-five dollars eighty-three cents, with costs of court in the first instance, he paying the costs of the appeal.

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PLACENCIA'S HEIRS vs. PLACENCIA ET AL.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF ASSUMPTION.

An act or instrument of writing purporting to be passed before a Spanish commandant, without the signatures of any witnesses or mention of any, will not be received as evidence of a donation or marriage contract.

In an action of partition between the forced heirs of the deceased mother and surviving father, a partition in nature must be effected, if practicable, before resorting to a sale.

The surviving partner of the community, has the right to have his half set out to him in nature, if it can be done.

This is an action of partition by the forced heirs of the deceased wife of Francisco Placencia, against the latter as surviving partner of the community, for one moiety thereof.

## CASES IN THE SUPREME COURT

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The defendant, Francisco Placencia, in his answer claimed, in virtue of a marriage contract passed before the Spanish commandant of Lafourche in 1793, a usufruct in all the property of the community for life; that in said contract, a mutual donation was granted to the survivor, of the usufruct of all the property present and to come during his or her natural life, &c.

On the trial, the defendants' counsel offered in evidence the marriage contract between the spouses to support the averments in the answer. The plaintiff objected to its being read in evidence.

1. Because the commandant simply signed his name, without the addition of his office as *ex officio* notary public.

2. There is no signatures to the act, except that of the commandant, and no mention that the parties did not know how to write.

3. Because there are no witnesses either mentioned in the act, or their signatures affixed thereto.

The objections were overruled and the document admitted for what it was worth. A bill of exceptions was taken to the opinion of the court.

The judge of Probates ordered an inventory and appraisement of the property of the community to be taken, and that it be sold in order to effect a partition, &c. The defendants appealed.

*Insley*, for the plaintiff.

1. The judge *a quo* erred in permitting the introduction of the document, purporting to be a marriage contract between Francisco Placencia and Poulonne Simoneau as an authentic act for the reasons set forth in the bill of exceptions. See *Law 58, Partida 3, tit. 18, vol. 2.*

2. Admitting, for argument's sake, that the document is *authentic*, and clothed with the legal formalities, the donation in prospect of marriage could not exceed the disposable quantum, to the prejudice of forced heirs, (that is, one-tenth in full property,) neither under the Spanish law nor under the Code of 1808. See *Partida 5, tit. 4, law 8. New*

*Recop., book 5, title 2, laws 1 and 2. 2 Louisiana Reports, 538, and the authorities therein cited; also, Old Civil Code, articles 222 and 224, page 256, and the subject of donations generally.* And consequently defendants could not resist an inventory and sale in order to effect a partition of the property in community between F. Placencia and his children. *Old Civil Code, article 156, page 184. Louisiana Code, articles 1214 and 1215.*

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vs.

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3. Should the act purporting to be a marriage contract be not *authentic*, as the appellants contend it is, it could not avail them as an act under private signature, as it would not correspond with the allegations in defendants' answer.

4. Indeed it cannot be considered as an act at all, because there are no signatures, either of the parties or witnesses, nor any declaration therein that the parties knew not how to write, formalities that must have been indispensably necessary, under the rigorous rules of the Spanish law relating to notarial acts.

5. Article 74, page 224, *Old Civil Code*, treats of the revocation or absolute nullity of donations between all persons, except by ascendants to the spouses, or by the spouses one to the other by the birth of children. Donations made by these latter are not *revocable*, but *reducible* only to the disposable quantum, and this is apparent by referring to article 26, page 213 and article 222, page 256 *Old Civil Code*. Under the Spanish law, donations thus made were *revocable*, if children were afterwards born. See 5 *Partida*, tit. 4, law 8.

6. The judgment of the court *a quo*, decreeing an inventory and sale, ought to be affirmed.

*Nicholls, contra.*

1. Judge *a quo* erred in rejecting marriage contract. It was clothed with all the formalities required by the existing law, or if informal, the court will overlook it, as an ancient record. It is tested by the necessary number of witnesses.

2. If the marriage contract be good, as to form, which appellant affirms it is, the dispositions contained in it are

**EASTERN DIST.** strictly legal, and did not exceed the power of the contracting parties. *Old Civil Code, article 74, page 224.*

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3. The Old Civil Code contains no new law ; it professes and is a compilation of the *pre-existing law*, and by the 74th article of *that Code*, the power of making donations is unlimited and unshackled.

4. Donation would, under no circumstances, be considered *null*. It could only be reduced. In the case of *Mercer vs. Andrews*, the wife came in contact with anterior creditors, and the contract originated in fraud ; here, no such creditors exist.

*Bullard, J.*, delivered the opinion of the court.

This is an action instituted by a part of the children of Francisco Placencia and Françoise Poulonne Simoneau, his wife, lately deceased, against the surviving husband and father, together with the other children, with a view of compelling a partition of the effects of the community formerly existing, and the further partition among the children of the half belonging to them in the right of their mother.

An act or instrument of writing purporting to be passed before a Spanish commandant, without the signatures of any witnesses, or mention of any, will not be received as evidence of a donation or marriage contract.

The defendant, Francisco Placencia, in answer alleges, that he is entitled during life to the usufruct of all the property composing the community, in virtue of a mutual donation, stipulated by marriage contract, in favor of the survivor. In support of his pretensions he relies on an instrument which appears of record, purporting to be a marriage contract, passed before Don Nicholas Veret, commandant of Valenzuela, in Lafourche, in the year 1793. This instrument is not authenticated by the signatures of any witnesses, nor is mention made in the body of it of any witnesses. All the parties sign by their ordinary marks, and the only signature susceptible of proof is that of the commandant. We are therefore of opinion, the judge did not err in disregarding it as authentic evidence of a contract.

In an action of partition between the forced heirs of the deceased mother and surviving father, a partition in nature must be effected, if practicable, before resorting to a sale. The Court of Probates gave judgment in favor of the plaintiffs, and ordered an inventory with appraisement, and subsequently a sale of all the property, for the purpose of

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effecting a partition. This part of the judgment, we think, ought to be modified, because the sale must depend upon the fact that the property cannot be conveniently partaken in nature, which according to the Louisiana Code, must be made to appear by the report of experts. The surviving husband has also a right first to have his half set out to him in nature, if it can be done.

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ET AL.  
vs.  
COPLAND.

The surviving partner of the community, has the right to have his half set out to him in nature, if it can be done.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs; reserving however to the defendant, Francisco Placencia, the right of having his half set out to him in nature, if practicable, and that no sale take place unless it shall appear to be necessary according to law, and without prejudice to the rights of the tutors of the minor children.

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### CANAL BANK ET AL. vs. COPLAND.

#### APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

In a case where the creditor may resort to the executory process in another court from that which rendered judgment, in order to have it executed, no property can be seized and sold under the executory process, which could not have been taken under the judgment first rendered.

The sheriff is required to execute process issued on executory proceedings, in the same manner as in ordinary cases under *fieri facias*.

The plaintiffs had judgment in the District Court, against the defendant, for the sum of two thousand six hundred

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and fifty dollars, and requiring him to execute his several promissory notes; one for two thousand six hundred and fifty dollars, and three others for twenty-one thousand two hundred dollars more, it being for the purchase of seven hundred and seventy-seven acres of ground; adjoining the town of Carrollton, by the defendant, at public auction, the 1st May, 1833. This judgment was dated the 18th March, 1834. A *fieri facias* issued on this judgment and was returned, no property found.

On the 1st of November, 1834, the plaintiffs applied to the Parish Court for the parish and city of New-Orleans, for a writ of seizure and sale against the tract of land in question, on the ground that the defendant was absent from the state and had left no known agent, attorney or representative, on whom process could be served. They pray that an attorney be appointed to represent him, with whom the writ of seizure and sale may be prosecuted contradictorily, and that the premises be sold according to law, on certain specified terms.

The parish judge granted the order of seizure and sale, according to the prayer of the plaintiffs, and an attorney was appointed to represent the absent defendant.

An agent and attorney for the defendant also appeared, and was recognised as such, who moved the court set aside the order of seizure and sale, on the ground that it had no jurisdiction, inasmuch as the property seized is not situated in the parish of New-Orleans, but in the parish of Jefferson, over which this court has no jurisdiction. The court overruled the objection and let the cause proceed. The defendant appealed.

*J. Slidell*, for the plaintiffs.

1. The plaintiffs were entitled to executory process for the sale of the land adjudicated to the defendant, for the payment of the entire price. This could not have been effected under an ordinary writ of *fieri facias*; such writ could only have issued for the instalments actually due.

2. The District Court could not have granted an order of seizure and sale, the case not coming within the provisions

of article 732 of *Code of Practice*. The parish Court had no such power under article 746, *Code of Practice*.

3. The sale having been made of a tract of land in block, even if a portion of it had been situated in the parish of Jefferson, which is negatived by the testimony, yet, if the greater part was situated in the parish of Orleans, the sale was well ordered to be made by the sheriff of New-Orleans.

*2 Martin, N. S.*, 562. The Parish Court had also jurisdiction, from the fact of R. Copland having been domiciled in the Parish. *Code of Practice*, article 163.

*Hennen*, for the appellant.

1. No executory process could issue in the case presented by the petition, to enforce the judgment of another court.

2. The Parish Court of New-Orleans had no jurisdiction in the cause, the land lying out of the parish.

3. The property which is prayed to be seized and sold, is not situated within the parish of Orleans, but within that of Jefferson; and, consequently, the sheriff of the parish of Orleans could not proceed against it, and the court was without jurisdiction, and all the proceedings are null.

4. The court erred in deciding against the motions made by the counsel for defendant, to set aside the executory proceedings.

5. The whole proceedings are irregular, informal and illegal, on the face of them. The plaintiffs were not entitled to the remedy of seizure and sale, asked for by them; and the sale has been irregularly and illegally made, and the whole is void.

6. The plaintiffs had no mortgage for the amount they claimed as due; and no executory process could issue on their application.

*Martin, J.*, delivered the opinion of the court.

The defendant complains of the discharge of a rule which he took on the plaintiffs, to show cause why an order of seizure and sale of certain property should not be set aside.

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The order of seizure and sale was granted by the Parish Judge, on a judgment obtained by the plaintiffs, against the defendant, in the District Court, for the First Judicial District, under the provisions of the *Code of Practice*, article 746.

The law provides for the execution of judgments which decree the payment of money, by writs of *fieri facias* and *capias ad satisficiendum*. Under the first writ, the debtor possesses the faculty of pointing out the property he can best spare, and which he prefers should be first seized. If he does not do this, his personal property is first to be taken, his slaves next, and afterwards his lands. This comprises the list, and the order in which the seizure is to be made. In no case can the creditor insist on the sale of any particular property, in preference to any other, unless he have it in pledge.

The article cited from the *Code of Practice*, authorises, indeed, the judgment creditor who chooses, to proceed in another court than that which rendered the judgment, by resorting to the executory process without any previous citation, as in case of an act importing confession of judgment, and to have the property of the debtor seized and sold.

We have not inquired, whether a creditor who proceeds by executory process in another court than that which gave judgment, is to obtain a writ of *fieri facias* from the court, or an order of seizure and sale at chambers.

We have very much doubted whether the District and Parish Courts, having concurrent jurisdiction over the parish, either of these courts can proceed in a case actually pending before the other.

But we have had but little hesitation in coming to the conclusion, that the creditor who finds it convenient to resort to such execution of his judgment in another court than that which first rendered it, cannot thereby place his debtor in *duriori casu*, and deprive him of the facilities the law secures to debtors in ordinary cases. He cannot be permitted to arrogate to himself the right of placing under the

hammer, any portion or description of the debtor's property EASTERN DIST.  
June, 1835. which his interest, caprice and avarice may prompt him to have seized.

This court sees no good reason why a tribunal other than the one which rendered judgment in the first instance, should order its execution in a different manner from that which the law has pointed out to the court which tried the cause, and gave the judgment sought to be thus enforced.

The counsel for the plaintiffs has stated in his points, that he resorted to the Parish Court for the purpose of securing the plaintiffs a remedy which the District Court was unable to give to them.

Hard, indeed, would be the case of the inhabitants of the city and parish of New-Orleans, if the circumstance of there being courts of concurrent jurisdiction situated therein, will authorise a creditor, after obtaining a judgment in one court, to seek the execution of it in another, which did not try the case or render judgment; and, by that means, point out any particular part or portion of the debtor's property for seizure and sale, as best suited his purpose.

A sound construction of the *article 746* of the *Code of Practice*, leads to the conclusion that, although the creditor may resort to the executory process in another court than that which rendered the judgment sought to be enforced, no property can be seized and sold under the executory process ordered by the latter court, which could not have been seized and sold under the judgment of the former. The sheriff is required by law to execute the process of either or both courts, in the same manner.

The law has not so provided, and this court sees no good reason to say, that the court last resorted to, and which did not render the judgment, can issue a different executory process from that which did.

It further appears to the court, that the order of seizure and sale improperly issued in this case, against a particular piece of land; the rule, therefore, should have been made absolute.

In a case where the creditor may resort to the executory process, in another court from that which rendered judgment, in order to have it executed, no property can be seized and sold under the executory process, which could not have been taken under the judgment first rendered.

The sheriff is required to execute process issued on executory proceedings, in the same manner, as in ordinary cases under *fieri facias*.

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*vs.*  
FOUCHER.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided, and reversed; that the rule be made absolute, and the order of seizure and sale be set aside; the plaintiffs paying costs in both courts.

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**MILLAUDON *vs.* FOUCHER.**

**APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.**

Where the notes or debt sued on are *not due* at the inception of suit, an attachment will not lie, on an affidavit in which the plaintiff only swears to the existence of the debt, *and that the defendant has left the state, never again to return.*

The act of 1826, amendatory of the articles 242-3-4 of the *Code of Practice*, requires in cases where the *debt is not due*, the further averment under oath, that the defendant is about to *remove his property* out of the state before said debts become due, in order to obtain a writ of attachment against it.

The debtor does not lose the benefit of the *term* stipulated for the payment of his debts, in regard to those not due, by simply leaving the state, when he leaves his property behind.

The provisions of the *Louisiana Code*, article 2049, require not merely an actual, but declared insolvency or inability to pay debts, by either a voluntary or forced surrender of his property for the common benefit of creditors, before the debtor loses the benefit of his term and his debts *not due*, taken and "deemed to be due."

This suit commenced by attachment. The plaintiff filed his affidavit with the clerk, on the 9th of June, 1834, in which he swears, "that Antoine Foucher, junior, is fully indebted to him in the sum of thirty-three thousand six hundred dollars, and that said Foucher, has left the state

of Louisiana, never again to return ;" upon which a writ of attachment issued against all the property of the defendant. On the next day, the plaintiff filed his petition, alleging that he was the lawful holder of seven promissory notes, drawn by Antoine Foucher, junior, payable at future days, amounting in all to the sum of thirty-three thousand six hundred dollars ; that said Foucher, junior, has become insolvent and absconded from the state, with the intention never to return, having committed various forgeries for large sums of money, and great rewards offered for his apprehension ; that by reason of said insolvency and absconding, all his debts became due and exigible, in pursuance of the provisions of law : wherefore he prays that his attachment be maintained and that he have judgment, &c.

H. R. Denis, Esq., counsel for the defendant, filed grounds and prayed that the attachment be set aside :

1. Because there is an order to stay proceedings against the person and property of the defendant.
2. The court has no jurisdiction of the case, the defendant having a permanent residence and domicil in the parish of Jefferson.
3. Because he is not an absentee in the eyes of the law, having left an attorney duly qualified to represent him in and out of the court.

On hearing the rule to show cause why the attachment should not be set aside on the grounds filed, and on producing evidence that the defendant had absconded, in manner as alleged, the parish judge was of opinion the grounds were insufficient, and discharged the rule.

On the 14th of February, 1835, the counsel for the defendant filed an exception and answer, in the following terms :

The answer of Antoine Foucher, junior, residing in the parish of Jefferson, by Emile Faurie, his attorney in fact, to the petition of Laurent Millaudon, &c. He denies that the court has jurisdiction of the case, because the defendant resides permanently in the parish of Jefferson ; and, therefore,

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the parish court has no jurisdiction of cases arising out of the parish, but that it belongs to the court of the First Judicial District, and prays to be dismissed. He then pleads the general issue to the merits.

The testimony showed that Foucher, junior, absconded about the 2d of May, 1834, before the institution of this suit, to avoid his creditors and the prosecution for forgery.

The parish judge decided, that as two of the notes sued on, amounting to nine thousand eight hundred dollars, were due and payable at the time the answer was filed, that the plaintiff had a right to recover that sum, reserving to him the right for the balance of the notes when they became due.

Judgment was entered accordingly. The defendant, by his attorney in fact, appealed.

*J. Slidell*, for the plaintiff.

1. A change of domicil is produced by the fact of residing in another parish, combined with the intention of making the principal establishment there. In the absence of a written declaration, the proof of this intention depends upon circumstances. *Code, articles 43 and 45.*

2. Domicil is the place where a person lives or has his home, fixedly, permanently, and to which, whenever he is absent, he has the intention of returning. *Story's Conflict of Laws, Nos. 41, 42, 43.* Two things must concur: residence, and intention to make it the home of the party. *No. 44.* Whenever a person actually removes to another place, with the intention of remaining there for an indefinite period of time, it becomes his place of present domicil, notwithstanding he may entertain a floating intention to return at some future period. *Ibid., No. 46.*

3. Foucher ceased to have his domicil in the parish of Jefferson on the day that he absconded. The fact of his leaving his domicil, coupled with the intention not to return, operated *ipso facto* a change of domicil. *Merlin's Rep., verbo domicile, § 11.* *Sirey, Recueil général des Lois et Arrêts, tome 13, part 2, 353.*

4. Having no fixed domicil, he may be sued wherever his person or property may be found. *Ripley vs. Dromgoole, 8 Martin, 709.*

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*Denis, contra.*

*Bullard, J.*, delivered the opinion of the court.

The view we have taken of the merits of the case, renders it unnecessary to examine the questions argued at the bar, touching the jurisdiction of the court under the plea of domicil.

None of the notes sued on were due according to their tenor at the inception of this suit, and the plaintiff in his affidavit swears only to the existence of the debt, and that the defendant has left the state never again to return. The act of 1826, amendatory of the Code of Practice, requires in cases where the debt is not yet due, the further averment under oath, that the defendant is about to remove his property out of the state, before said debt shall become due. *Act of 1826, section 7. Code of Practice, 243, 244.*

This seems to us a fatal objection, unless the debt by operation of law and the act of the defendant had become due, at the time the attachment was levied. In the petition filed the day after the writ of attachment issued, the plaintiff alleges that the defendant had become insolvent and had absconded, and that by reason of such insolvency and absconding, all his debts became due and exigible. This leads to the inquiry, under what circumstances and for what causes, does a debtor lose the benefit of the term stipulated for the payment of his debt?

Article 2049 of the Louisiana Code declares, that "wherever there is a cession of property either voluntary or forced, all debts due by the insolvent shall be deemed to be due, although contracted to be paid at a time not yet arrived; but, in such case, a discount must be made of the interest at the highest conventional rate if none has been agreed on by the contract."

Where the notes or debt sued on are not due at the inception of suit, an attachment will not lie, on an affidavit in which the plaintiff only swears to the existence of the debt, and that the defendant has left the state, never again to return.

The act of 1826, amendatory of the articles 242-3-4 of the Code of Practice, requires in cases where the debt is not due, the further averment under oath, that the defendant is about to remove his property out of the state, before said debts become due, in order to obtain a writ of attachment against it.

The debtor does not lose the benefit of the term stipulated for the payment of his debts, in regard to those not due, by simply leaving the state, when he leaves his property behind.

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The provisions of the Louisiana Code, article 2049, require not merely an actual, but declared insolvency or inability to pay debts, by either a voluntary or forced surrender of his property, for the common benefit of creditors, before the debtor loses the benefit of his term, and his debts *not due*, taken and "deemed to be due."

This article of the code requires not merely an actual insolvency or inability to pay debts, but a surrender of property either voluntary or forced, for the common benefit of creditors. The general rule is, that what is due by contract at a particular time, cannot be demanded before the expiration of the intermediate time; and the article above recited creates exceptions, to wit: in cases where an insolvent debtor has made a surrender either voluntary or forced. It is not enough, in our opinion, that the debtor be in insolvent circumstances, and although in relation to certain classes of persons, their absconding may authorise a forced surrender; yet, until such proceedings be had, there is no forced surrender within the meaning of the code.

Attachment laws must be strictly construed, and no essential formality can be dispensed with. The plaintiff places himself in this case in a dilemma. If his debt was not due, he did not pursue the formalities required by law to entitle him to an attachment. If it was due by operation of law, then the law requires a *concurso* among all the creditors and an administration of the property for their common benefit, and does not authorise a creditor whose debt is not in fact due, to gain an advantage over other creditors whose debts are actually due, by seizing on sufficient property under his attachment to pay the whole of his demand, without submitting to the defalcation contemplated by the article of the code above mentioned. In cases of surrender the creditor cannot proceed separately.

It is true the old Code contained a much broader rule on this subject and provided, that "the debtor can no longer claim the benefit of the term after he has failed, or after he has by his own act diminished the securities given by the contract to his debtor." *Old Civil Code, page 276, article 88.* This article appears to have been omitted in the amended code, and the one first above recited substituted for it. The provision in the old Code is copied literally from *article 1188 of the Code Napoleon.* Under these dispositions it has been ruled by the Court of Cassation, that the sale by the debtor

of a part of the premises mortgaged for the security of the debt by the contract, operated a forfeiture of the term and the whole debt becomes due and demandable, although the creditor may have received the whole price of the part sold in the proceedings instituted by the purchaser to purge the mortgages. 10 *Sirey*, 139.

The act of absconding, under that provision, may perhaps have operated a forfeiture of the stipulated term by diminishing the security of the creditor. But it appears to us, that the latter clause of the article of the old Code referred to, has been repealed by the Louisiana Code. The two provisions cannot exist together, and courts of justice are not authorised to create new exceptions not recognised by law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled and reversed, the attachment dissolved, and that there be judgment against the plaintiff as in case of a non-suit, with costs in both courts.

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## ON A RE-HEARING GRANTED.

Where suit is instituted on notes before they become due, judgment may well be rendered for as much of the debt as *is due* when the answer is filed.

The exception to the prematurity of a suit is a dilatory one, and must be pleaded in *limine litis*.

An attachment may legally issue against the property of an absconding debtor, who leaves the state never to return, for debts that are due, against any property of his, within the jurisdiction of the court that issues it.

This case comes before the court in this instance on a re-hearing, granted on the motion of the counsel for the plaintiff. See the case, *ante*, 582.

J. Slidell, for the plaintiff, made the following points, and cited the authorities below in support of the re-hearing.

1. The defendant in the inferior court moved to have the attachment set aside, on certain grounds specially assigned by him; that on which the court has decided the case was not made by him; he must be considered as having waived the exception, and the Parish Court could not supply it for him; *a fortiori*, this court is without such power. 4 *Louisiana Reports*, 432. 7 *Ibid.*, 599.

2. Dilatory exceptions must be pleaded in *limine litis*. *Code of Practice*, article 333. 1 *Martin, N. S.*, 130. 4 *Ibid.*, 439. The premature commencement of the action could only be taken advantage of by dilatory exceptions. 7 *Martin, N. S.*, 384. 1 *Louisiana Reports*, 420.

3. Foucher's insolvency and assignment of his property, is shown by the evidence offered by the defence. It is alleged

in his notice to set aside attachment. By the insolvency, his debts became due. 5 *Martin*, 144; 1 *La. Reports*, 502. By absconding, he deprived the creditor of the security afforded by the control over his person which he might have exercised. See article 2050, *Code*.

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4. The debt was due when the answer was filed; personal service was made on Foucher's attorney in fact; answer filed by his attorney. This converted the whole proceeding into an ordinary action, and judgment must stand. 8 *Martin, N. S.*, 358. Every one may renounce his rights; the defendant has abandoned this ground of defence. Supposing it to be tenable, the court cannot force it upon him.

*Denis, contra.*

*Bullard J.*, delivered the opinion of the court.

A re-hearing having been allowed in this case, the counsel for the appellee has called our attention to the fact, that the notes on which judgment was rendered below, had become due before the answer was filed, and he contends that as the defendant did not specially except to the prematurity of the suit, he must be considered as having waived that exception which ought to have been pleaded *a limine litis*. In this position we think he is sustained by the provisions of the Code of Practice and the decision of this court in the case of *Howard et al. vs. steam-boat Columbia*. 1 *Louisiana Reports*, 420.

Where suit is instituted on notes before they become due, judgment may well be rendered for as much of the debt as is due when the answer is filed.

The exception to the prematurity of a suit, is a dilatory one, and must be pleaded *in limine litis*.

An attachment may legally issue against the property of an absconding debtor, who leaves the state never to return, for debts that are due, against any property of his, within the jurisdiction of the court that issues it.

We concur with the court below in the opinion, that under the circumstances of this case it had a right to issue an attachment against the property of the absconding debtor. Having left the state never to return, his creditors had a right to proceed by attachment in any court within whose jurisdiction he possessed property, and the exception to the jurisdiction of the court was properly overruled. But, we are still of opinion that the attachment ought not to have been maintained after the answer to the merits on the part of the defendant, because it was issued without a sufficient affidavit;

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June, 1835. while, therefore, we maintain the judgment for so much of  
the debt as was due when the answer was filed, we think  
the attachment ought to be dissolved.

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It is, therefore, ordered, adjudged and decreed, that the judgment heretofore pronounced by this court be set aside, and, it is further ordered, adjudged and decreed, that the judgment of the parish court, so far as it condemns the defendant to pay the sum of nine thousand eight hundred dollars with interest, costs, &c., be affirmed; and, it is further ordered, that the attachment be set aside and dissolved, and that the appellee pay the costs of this appeal.

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#### ATTACHMENT.

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<p>2. An attaching creditor of the same common debtor, whose suit is not decided, and his demand still <i>sub judice</i>, cannot intervene and impede the execution of the judgment creditor, and require the funds attached in the two cases, to be equally distributed between them. ....</p> <p>3. In relation to legal proceedings against debtors, not known to be insolvent, no distinction exists between suits prosecuted in the ordinary way, and by attachment. An intervention of other attaching creditors, before or after judgment, will be dismissed.....</p> <p>4. Where claimants are in possession of property attached, it lies on the attaching creditor to show title in the defendant.... .</p> <p>5. The attaching creditor is not bound to show, that the property attached actually belongs to his debtor, in order to repel the claim of an intervening party. It is sufficient to show that it does not belong to the claimants.</p> <p>6. Slaves inherited by the wife in Mississippi, where the common law prevails, and according to the principles of which they become the property of the husband, are liable for his debts, and when brought into this state, may be attached the moment they arrive, or on their passage through, and sold to pay his debts.....</p> <p>7. The plaintiff in attachment will recover from the garnishees whatever sum is shown to be in their hands, belonging to the defendant at the time the attachment is levied.....</p> <p>8. Where the notes or debt sued on are not due at the inception of suit, an attachment will not lie on an affidavit, in which the plaintiff only swears to the existence of his debt, and that the defendant has left the state never again to return.....</p> <p>9. The act of 1808, amendatory of the articles 242-3-4 of the Code of Practice, requires in all cases where the debt is not due, the further averment under oath, that the defendant is about to remove his property out of the state before said debts become due, in order to obtain a writ of attachment.....</p> <p>10. An attachment may legally issue against the property of an absconding debtor, who leaves the state never to return, for debts that are due, against any property of his, within the jurisdiction of the court that issues it.....</p>	<p><i>Garland &amp; Osborn vs. Grinnell et al.</i>, 57</p> <p><i>ib.</i></p> <p><i>ib.</i></p> <p><i>Thayer vs. Page et al.</i>, 135</p> <p><i>Slocomb vs. Breedlove et al.</i>, 143</p> <p><i>ib.</i></p> <p><i>ib.</i></p> <p><i>Erskine et al. vs. Cole et al.</i>, 270</p> <p><i>Millaudon vs. Foucher</i>, 582</p> <p><i>ib.</i></p> <p><i>Same parties</i>, 586</p>

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*Bedford vs. Urquhart et al.*, 241

2. So, where the purchaser was in possession for more than twenty years, under a conveyance executed by a person styling himself attorney in fact, without evidence of the agency, it was held that this furnished a legal presumption of agency. .... *ib.*

## ATTORNEY AT LAW.

1. Where a corporation, by a vote of its directors, appoints an attorney at law to manage its legal business, with a stated annual salary, and he accepts the office, the contract is binding on both parties for the period of one year, when there is no provision authorising either party to retract at will.

*Orphan Asylum vs. Mississippi Marine Insurance Co.*, 181

2. So, where an attorney at law was appointed the attorney of the insurance office of the defendants, with an annual salary of five hundred dollars, and was dismissed by the board of directors at the end of two and a half months: *Held*, that he is entitled to recover his salary for the whole year..... *ib.*

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## BAIL.

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1. Where judgment is rendered against a debtor, who is returned not found on a *sciri facias* and *capias ad satisfaciendum*, and the bail fails to produce him when called on, judgment will be entered against the bail for amount of the debt on motion, after ten days' notice in writing, and on the exhibition of the return of *not found*, on said writs.

*Hudson vs. Perry et al.*, 121

2. It does not follow that when the principal debtor leaves the state without the leave of the court, the penalty of the bail bond attaches absolutely. The surety has still the right to surrender him at any time before judgment against himself..... *ib.*

3. The principal obligation assumed by the surety in a bail bond, is to pay the judgment or surrender the debtor in execution..... *ib.*

4. The neglect or refusal of the surety to surrender the debtor in execution, is to be taken as *prima facie* evidence that the latter has departed from the state and the bail thereby forfeited..... *ib.*

5. But the bail or surety has the right to discharge himself by a surrender of the debtor until final judgment is entered, and the debtor is considered in law as in the friendly custody of his surety, who, in case of escape, has at any time a right to arrest him by the aid of legal process..... *ib.*

6. The law authorises the creditor to arrest his debtor and hold him to bail, when he is about to depart from the state, even for a short time, when he leaves no property behind. It is not sufficient that he has settled and commenced permanent business in the state, to exempt him.

*Henshaw vs. Ladd*, 512

## BANK.

1. A bank or other institution taking a security bond from its cashier or other officer, cannot be compelled to cancel and surrender it to the maker, on the resignation and settlement of his accounts; even when they are found correct, and the effects, money, and all belonging to the office are delivered over to his successor..... *Clague vs. City Bank*, 48

2. The bank may hold the security bond of its cashier after his resignation and the settlement of his accounts, as an indemnity, should it afterwards be discovered that his conduct, while in office, had occasioned injury to the institution..... *ib.*

3. The prescription of three years, elapsing after his resignation, does not extinguish the obligation of the cashier's bond; and until it is prescribed against, the bank may hold the bond as an indemnity. *Clague vs. City Bank*, 48

## BILLS, NOTES AND CHECKS.

1. The owner of a check payable to bearer, on a Bank in New-Orleans, at sight, for six hundred and fifty dollars, having lost it by accident, and it was sold at St. Louis, fifteen hundred miles from the place of payment, twenty-five days after date, by a passenger in a steam-boat, to a merchant who went from New-Orleans, for its full value in goods and money; and the latter sold it to the plaintiffs at five per cent. discount, who sued the drawers: *Held*, that the circumstances under which the check came into the possession of the plaintiffs, were so suspicious, that a person of ordinary prudence ought to have hesitated and examined further before buying; and that no recovery can be had on the check, under the circumstances.

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2. The plaintiffs, as holders, sue the maker and endorser of a promissory note: intervenors claim the note and allege, that it was the property of their ancestor, from whom it was stolen and came unfairly and without consideration, into the hands of the plaintiffs: *Held*, that when the testimony shows the note was not obtained in a fair course of trade, the holder is not considered *bond fide*, and cannot recover, as against the true owners.....*Dupeux vs. Troxler et al.* 92

3. Where the plaintiff is not the holder of the note sued on, but only his agent to deliver it to the maker, and knew the greater part of it had been paid, and took advantage of the absence of the maker, to obtain a judgment for the whole amount of the note, it would present the case of a judgment obtained through fraud, which might be avoided by direct action of nullity.

*Garlick vs. Reece*, 101

4. Where the right to sue is expressly denied to the holder of a promissory note, and the evidence does not show he received it from a person authorised to negotiate it; and when it is shown the note was not put in circulation until after a discharge was given by the original holder against it, under an assignment of property by the maker: *Held*, that the plaintiff cannot recover, but will be non-suited.....*Morrison vs. French*, 118

5. Where the acceptors of bills, on a condition to pay, when certain other bills placed in their hands, on the Mexican government, were collected, are sued on the acceptance: *Held*, that their liability depended on the fact of collection or the want of that diligence which, as faithful agents, they were bound to use: *held*, also, that when the evidence is such as to induce the

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jury to believe the acceptors profited or were benefited by the use of the Mexican bills, or that they were collected or used by the agent of the defendants, for his own purpose, the verdict of the jury for the plaintiff will not be disturbed.....*Phillips vs Newton & Co.*, 150

6. Where the certificate of the notary states that notice was given to the endorser, by depositing it in the post office in this city, addressed to him there: *Held*, that the certificate *per se*, is clearly insufficient to prove notice, whatever may have been the domicil of the endorser, as no diligence is shown to find his domicil, or give him personal notice.

*Porter et al. vs. Boyle et al.* 170

7. Where the endorser resides in a faubourg of New-Orleans, notice of protest addressed to him and deposited in the city post office, is insufficient, without showing reasonable diligence to give him personal notice..... *ib.*

8. In a suit against endorsers of a promissory note given for the price of sugar sold by them as agents of the owner, and they show they were not bound to warrant the solvency of the purchaser, that the note was drawn to their order and endorsed in blank in the absence of the owner of the sugar, who took it in settlement, and the plaintiff is proved to be his agent: *Held*, that the endorsers are not liable.....*M'Donough vs. Goulé & Lambert*, 427

9. When the plaintiff's right to sue as the *bona fide* holder of an endorsed note is contested, and it is shown he became possessed of it as agent, and not in the usual course of trade, the endorsers may show that they endorsed for the principal, only as agents and without ultimate responsibility..... *ib.*

10. A person who endorsed notes at the instance of the transferor, to enable him to raise money, under an assurance that he was never to be liable, can avail himself of all the original equity against the subsequent holder, who took them after dishonor.

*Whitwell, Bond & Co. vs. Crehore, Ex'r., &c.* 540

11. Where an endorser endorsed notes for the accommodation of the holders, without receiving any consideration whatever, they cannot recover against him, nor their endorsee, who takes the note after its dishonor..... *ib.*

12. On due proof of the previous existence, loss and contents of a bill of exchange, the owner will recover its amount of the acceptor, on tendering security to indemnify the party against a second payment....*Miller vs. Webb* 516

13. Where A purchased one-fourth of a sugar plantation, and gave his notes in part payment to B and C, who remained joint owners of the other three-fourths, and when it was stipulated that B and C, the vendors, should

pay three-fourths of a mortgage which they had previously given on the premises, to the bank, and A pay the other fourth, and B and C fail, so that the mortgaged premises are seized and sold to pay off the mortgage: *Held*, that no recovery can be had against A by the vendors on his notes, there being a failure of the consideration. *Kernion vs. Jumonville de Villier*, 547

14. A failure of the consideration of a promissory note, by the misconduct of the payee, without the fault of the maker, will discharge the latter from his obligation..... *ib.*

15. The law requires *notice* of protest and non-payment of a promissory note, by the maker to be given to the endorsers at the time; and this notice must be alleged and proved by other evidence than the instrument of protest, or they will not be liable. .... *New-Orleans Savings Bank vs. Richards et al.*, 550

### BROKERS.

1. Brokers are persons who negotiate for others, and as acknowledged agents have power to bind their principals.

*Garcia et al vs. Champomier et al.*, 519

2. But, persons stipulating to furnish flour at a fixed price for a certain commission and at a given day, will be considered as acting for themselves, and be personally responsible for their contracts..... *ib.*

### COLLATION.

1. The law contemplates a perfect equality among co-heirs, and each one is bound to collate the advantages derived from the ancestor to whose succession he is called..... *Benoit vs. Benoit's heirs*, 229

2. Collation is an incident of the action of partition, but the obligation to collate cannot be destroyed by the fact that the ancestor had given away every thing in his lifetime, to one of his children to the exclusion of the others..... *ib.*

### COMPENSATION

1. Compensation is of three kinds: legal, or by operation of law; compensation by way of exception, and by re-convention.

*Blanchard vs. Cole et al.*, 153

2. A debt due to persons individually as legatees, cannot be offered in compensation of a demand, due by them in their social capacity as a commercial firm..... *Ibid.*, 160

3. Compensation does not take place by operation of law between mutual claims, when one of them is unliquidated. *Blanchard vs. Cole et al.* 160
4. Garnishees cannot plead a demand against the defendant, in compensation, by way of exception to the plaintiff's right to recover..... *ib.*
5. The last purchaser of a plantation and slaves, may pay off previously existing debts, due by his vendors, and for which both he and the premises are liable, and be subrogated to the rights of these creditors, against his immediate vendor, and compensate such payment against the instalments as they become due..... *Mitchell vs. Johnson,* 525

## CONFLICT OF LAWS.

1. The law of the domicil of a person inheriting, will govern in relation to the rights of the inheritance..... *Hicks, administrator, vs. Pope,* 554
2. So where a slave is inherited by the wife from her father, dying in Alabama, which if reduced to possession by her husband domiciled there, would have become his absolute property; but the domicil of the husband and wife being in Louisiana at the time, every thing falling by inheritance to the wife, becomes her separate property..... *ib.*
3. A curator appointed by the Court of Probates in this state, to administer a succession opened here, is without authority to administer property, or collect debts of the succession in another state, under this appointment..... *Schneller, curator, &c. vs. Vance,* 506
4. Citizens of this state, who are creditors of a succession, opened and administered here, have the moral and legal right to pursue property of the deceased, situated in another state, and exercise their rights and claims to it, according to the laws of that state, without being answerable to the curator or administrator here..... *ib.*

## CONTINUANCE.

1. In applications for continuances of causes on the affidavit of the party, necessity and the general practice of the courts, admit suitors to swear for themselves. Counter-affidavits, as a general rule, cannot be received against an affidavit for a continuance..... *Maher et al. vs. Pulley,* 89
2. Exceptions to the general rule, prohibiting suitors from swearing *pro* and *con* for a continuance, ought to be disallowed, when the case has been repeatedly continued on the application of the party, or where suspicions arise that he is acting in bad faith..... *ib.*

3. On a motion for a continuance on an affidavit, that the defendant could prove payment to a third person, who was to save him harmless: *Held*, that the continuance was properly refused, when the fact to be proved, would not have benefited the party applying for it.

*Anselm vs. Wilson*, 35

### CONTRACT.

1. In reciprocal obligations, the party who does not perform his part of the engagement, cannot avail himself of any rights resulting to him from the contract: consequently, the other party may demand its rescission.

*Mortec vs. Roache's Syndic*, 81

2. In a reciprocal engagement, resulting from the sale of certain slaves, where the purchaser becomes bankrupt and surrenders the slaves with his other property, before payment of the price: he not being the absolute owner, his right is defeasible and the seller may have a rescission of the sale and compel the syndic to restore possession of the property..... *ib.*

3. The proprietor has a right to cancel the bargain he makes with the undertaker, even in case the work has already commenced, by paying the expense and labor already incurred, and such damages as the nature of the case may require..... *Dufour vs. Janin*, 147

4. But whether an undertaker be discharged for good cause or not, the contract is at an end. It ceases to be any longer the standard by which to estimate the value of the work actually done, but it may be given in evidence, to show the estimate the parties had made of the work to be done. *ib.*

5. In commutative contracts the defendants need not be put in *mora* by a tender of the price, when it is shown they refused positively and declared they were unable to comply, when demanded to do so.

*Garcia et al. vs. Champomier et al.* 519

6. The defect in the mode of executing a contract does not annul it; it only gives to the other party the right of repudiating it, but which he may ratify and carry into execution, and thereby cure the defect.

*Beal vs. McKiernan*, 569

### CORPORATION.

1. Where a corporation alienated a lot of ground subject to a ground rent of six per cent. per annum, on one thousand seven hundred and twenty-five dollars, payable quarterly, with condition that if two or more quarters remained unpaid, the alienor may enter: *Held*, that when the premises were transferred to a third person, who died without paying the arrearages

of rent, a sale by the syndics of his creditors, provoked by the corporation, divested his title thereto, so his heirs at law cannot recover.

*Poultney's Heirs vs. Barrett et al.* 441

2. When the right of entry, stipulated for by the corporation, becomes absolute by arrearages of rent accruing, and non-compliance with the conditions, the purchasers and vendees are mere tenants at will, as the corporation had a right to enter at any time..... *ib.*

### COURT OF PROBATES.

1. The Court of Probates is *without* jurisdiction in a suit for a partition in which the defendant sets up title to the premises claimed to be divided, and the other party alleges the sale under which he claims, is fraudulent and simulated..... *M'Caleb et al vs. M'Caleb,* 459

2. The Court of Probates has authority to decide on the character and validity of sales of land and slaves, when the question arises collaterally in the examination of other matters in which it has jurisdiction..... *ib.*

3. So, where the natural son is alleged to have received donations *inter vivos*, disguised in the form of sales, which is required by the legitimate heirs to be brought into partition, the Court of Probates has jurisdiction to inquire collaterally into the character of the sales, to ascertain if this property is to be included in the partition of the whole estate..... *ib.*

### CURATOR.

1. A curator appointed by the Court of Probates in this state, to administer a succession opened here, is *without* authority to administer property or collect debts of the estate in another state.

*Schneller, curator, vs. Vance,* 506

2. So, a creditor of an insolvent succession opened and administered here, who collects his debt out of the property of the deceased debtor situated in another state, is not required by law to refund to the curator here for an equal distribution among all the creditors..... *ib.*

### DAMAGES.

1. Smart-money, or vindictive damages can only be given against the wrong-doer or offender, by way of punishment; but not against persons who are only consequentially liable on account of their relation to the wrong-doer, as the principal for the acts of his agents.

*Keene vs. Lizardi et al.,* 26

2. Where a party, whose execution is enjoined in the sheriff's hands, puts in an answer praying for a dissolution of the injunction, with damages, and for judgment against the principal and surety on the injunction bond, for the original debt, and which was dissolved with costs only, and the judgment acquiesced in: *Held*, that in another suit on the bond against the surety, the party can recover only such damages as he may prove independently of the interest and damages given by statute, when the former judgment is set up as a bar to the action. The question of damages will be left to the jury..... *Robertson et al. vs. Penn*, 61

3. When there is nothing in the record which would authorise the appellant to hope for any relief against a judgment rendered on his confession, it will be affirmed with ten per cent. damages.

*M'Phlin's Executor vs. Gillise*, 180

#### DEBTOR AND CREDITOR.

1. No debtor is bound to pay a debt by portions, and no partial transfer can be made by a creditor, so as to be binding on the debtor, even when notice is given, except by the express consent of the latter.

*Miller vs. Brigot et al.* 533

2. The proprietor is not even obliged to accept a draft, or to pay it when his debt to the undertaker is due, which the latter draws on him for a portion of the last instalment, in favor of the material man. He may pay the whole sum to the undertaker, when it is due, unless suit is previously brought..... *ib.*

3. The debtor does not lose the benefit of the *term* stipulated for the payment of his debts, in regard to those not due, by simply leaving the state, when he leaves his property behind..... *Millaudon vs. Foucher*, 582

4. The provisions of the *Louisiana Code*, article 2049, require not merely an actual but declared insolvency or inability to pay debts, by either a voluntary or forced surrender of his property for the common benefit of creditors before the debtor loses the benefit of his term, and his debts *not due*, "taken and deemed to be due."..... *ib.*

5. Where a suit is instituted on notes or debts before they are due, judgment may well be rendered for as much of the whole debt as is due at the time the answer is filed..... *Millaudon vs. Foucher*, 587

6. Citizens of the state, who are creditors of a succession opened and administered here, have the moral and legal right to pursue property of a succession, situated in another state from that in which it is opened, and exercise their rights and claims to it, according to the laws of that state, without being answerable to the curator or administrator here.

*Schneller, Curator, &c. vs. Vance*, 506

## DEMAND.

5. Where the plaintiff's counsel employed a person to make a demand on the debtor, who presented the account, but did not tell the defendant it was his only business, or that he came to make a demand : *Held*, to be sufficient, when, from the circumstances attending this fact, the judge who tried the case was satisfied the amicable demand was proven.....*Ott vs. Mortee*, 409

## DENIAL OF SIGNATURE.

1. The penalty which the law denounces, by depriving a party of every other means of defence, who expressly denies his signature, and it is proved by his adversary, is not incurred by the denial of his having made and executed the note sued on, or to which his signature is attached.

*Stockton vs. Truxton*, 224

2. Although an express denial of every allegation, is an express denial of each one ; yet the plea of the general issue does not waive others, and an express and special denial of the signature is required before the party is debarred from every other plea, on proof being made of his signature..... *ib.*

## DOMICIL.

1. Where a resident of New-Orleans, on the 28th of February, gave notice to the parish judge of St. Tammany, that he had changed his domicil to that parish since the 1st January past, but omitted to notify the parish judge of New-Orleans of his intention to change his domicil, and did not actually remove until service of citation on him the 9th of April following: *Held*, that he was properly sued at his legal domicil, and that the District Court sitting in the parish of New-Orleans had jurisdiction of the case.

*Waller vs. Lea*, 213

2. A change of domicil is produced by the *act of* residing in another parish, combined with the intention of making one's principal establishment there..... *ib.*

3. When several persons residing in different parishes contract a joint obligation, they must all be sued jointly and judgment rendered against each for his portion; but they may all be sued at the domicil of any one of them, which is an exception to the general rule; and they are considered as having waived their personal privilege of being sued at their own domicil.....*Toby & Co. vs. Hart et al.*, 523

4. The law of the domicil of a person inheriting property, will govern in relation to the rights of the inheritance.....*Hicks, administrator, vs. Pope* 554

5. So, where a slave is inherited by the wife from her father, who died in Alabama, and which if reduced to possession by her husband, domiciled there, would have become his absolute property; but the domicil of the husband and wife being in Louisiana at the time, every thing falling by inheritance to the wife, becomes her separate property..... *ib.*

### DONATION.

1. In every thing relating to the contract of donation, the acceptor for the donee, who is a minor, is *functus officio* when he has accepted; and no written or explanatory act made by him afterwards, will have any effect in relation to the right of the donee..... *Marie Louise, f. w. c. vs. Marot et al.* 475

### EVICTION.

1. Where the evidence shows, that all the land on a certain water course, on which a tract of land claimed under a Spanish grant was located, from its source to its mouth, has been surveyed by order of the United States; and, although the tract claimed must have been passed over and embraced in the survey of the entire tract, yet, this does not amount to an eviction of the claimant so as to authorise him to recover back the purchase money from his vendor..... *Keene vs. Clark's heirs*, 114

2. The danger which a purchaser may apprehend of ultimate eviction, on account of minors being interested in the property sold, ought to have been considered before he bought and paid the price of adjudication. It will not authorise an injunction to restrain the owners from receiving the proceeds of the sale..... *Lameyer vs. Rousan*, 280

### EVIDENCE.

1. Parole evidence of a fact that should appear by entry on the minutes, and of record, is irregular and novel; but the objection will not be noticed on appeal, when it does not seem to have influenced the decision of the cause..... *Blanchard vs. Cole et al.*, 153

2. The treasurer's deed of conveyance to the purchaser of a tract of land sold for the state taxes, is insufficient evidence of title, without legal evidence of the original assessment of the taxes due.

*Winter vs. Thibodeaux's executors et al.*, 193

3. A judgment of the minor against his tutor when not attacked as fraudulent and collusive, is *prima facie* evidence of the amount due, in an hypothecary action against the third possessor..... *ib.*

4. Where the note sued on and annexed to the petition, is described as bearing date in December, and the one offered in evidence according to the

	PAGE.
report of experts shows the Roman numeral X was used instead of the word December: <i>Held</i> , to be properly admitted in evidence of the plaintiff's demand, notwithstanding the objection of the defendant on the ground of variance.....	<i>Blanchard vs. Maurin</i> , 200
5. A certified copy of a deed or private act of sale, signed by the vendor and two witnesses, and recorded in the parish judge's office, is admissible and competent evidence to prove title to the property, when one of the subscribing witnessess swears the vendor told in his lifetime, that he had destroyed the original deed.....	<i>Stanley vs. Addison et al.</i> , 207
6. Where the destruction of a deed is only proved by a single witness, who testified to the declarations of the vendor, that he had destroyed it in a drunken frolic: <i>Held</i> , that the proof is sufficient and legal, as the witness was not called on to prove a contract, but only to testify to a fact. Evidence of the confessions of the vendor, under whom the plaintiff claims in this case, is sufficient to prove the loss of the original deed.....	<i>ib.</i>
7. Parole evidence, although inadmissible to prove title to immoveable property and slaves, or to destroy such title, yet, it is admissible to establish collateral facts connected with the transaction.....	<i>Spencer vs. Sloo</i> , 290
8. Where it is alleged that an error to the prejudice of the maker of a negotiable note endorsed in blank, was made in calculating the amount for which it was given, parole evidence will be received to explain and correct the error, even if the note is in the hands of a third person who received it <i>in autre droit</i> , when he sustains no injury thereby.	<i>Arcenaux vs. Jourdan et al.</i> , 310
9. Parole testimony is admissible to prove that the lost bill of exchange sued on, was duly advertised, without the production of the advertisement, or the newspaper in which it was published.....	<i>Miller vs. Webb</i> , 516
10. An act or instrument of writing purporting to be passed before a Spanish commandant, without the signatures of any witnesses, or mention of any in the body of the act, will not be received as evidence of a donation or marriage contract.....	<i>Placentia's heirs vs. Placentia et al.</i> , 573

#### EXECUTION.

1. An execution cannot be quashed and set aside on the return of the sheriff, that the defendant has deposited the money in his hands, conditionally, to await the decision on an attachment of the debt, by the debtor himself, in a suit against the plaintiff in execution.

*Richardson vs. Gurney*, 255

## EXECUTORY PROCESS.

1. Where the wife makes opposition and procures an injunction against proceedings in the *via executiva*, on the ground, that she has a prior claim and mortgage on the property seized; and the seizing creditor answers, and denies her claim and mortgage, and avers, she has made herself liable for his claims, by intermeddling in her husband's succession: *Held*, that the demand set up in the answer was reconventional, and not a proceeding in the *via ordinaria* as distinguished from the *via executiva*, and the court did not err in proceeding to inquire into the personal liability of the wife to pay the debt.....*Bank of Louisiana vs. Stansbury et al.*, 257

2. In a case where the creditor may resort to the executory process in another court from that which rendered judgment, in order to have it executed, no property can be seized and sold under the executory process, which could not have been taken under the judgment first rendered.

*Canal Bank vs. Copland*, 577

3. The sheriff is required to execute process issued on executory proceedings, in the same manner as in ordinary cases under *fieri facias*. *ib.*

## GARNISHEES.

1. Garnishees cannot offer the papers of a suit, by a third person, in evidence, to show the same property has been attached in their hands.

*Blanchard vs. Cole et al.*, 153

2. Garnishees cannot plead an open account, in compensation of the value of the debtor's property in their hands, at the time it is attached by a creditor..... *ib.*

3. Garnishees cannot set up a demand in compensation, against the defendant in the suit, which does not take place by the mere operation of law..... *ib.*

4. So, where the garnishees owed the defendants a balance for account of sales, and for property on hand, and set up a demand in compensation, for notes and interest due them as legatees of their deceased brother: *Held*, that this debt is not extinguished by compensation between them and the defendants, and the property and funds in their hands, must be considered as liable to the plaintiff's attachment against the defendants..... *ib.*

5. Garnishees cannot plead a demand against the defendant in attachment, in compensation by way of exception, to the right of the plaintiffs to recover..... *Ibid.*, 160

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6. Garnishees cannot plead a demand in compensation by way of exception. It can only take place by operation of law. *Vairin & Reel vs. Cole et al.*, 163
7. The plaintiff in attachment will recover from the Garnishees, whatever sum is shown to be in their hands, belonging to the defendant at the time the attachment is levied..... *Erskine et al. vs. Cole & Co. et al.*, 270

## HEIRS.

1. Where a common ancestor was owner in his own right, of a tract of land before his second marriage, part of which he sold during his second marriage, for two thousand dollars, which was unpaid at the death of his second wife, and in the settlement of the community it was included in the mass, instead of being reserved as the sole property of the husband, but was partitioned among all the children: *Held*, that the child of the first marriage, in an action in the District Court, can compel the children of the second to collate and pay over the difference, so as to allow her a share, equal to one-half of the separate property of the common ancestor.

*Benoit vs. Benoit's heirs*, 228

2. The law contemplates perfect equality among co-heirs, and each one is to collate the advantages derived from the ancestor, to whose succession he is called..... *ib.*
3. An heir who was not a party to the proceedings in the Probate Court, in the settlement of a succession in which she is interested, and her rights compromised, is not bound by them, and may maintain a separate action against her co-heirs, to recover her lost rights..... *ib.*

4. Minor heirs without acceptance must be considered as strangers to the succession, which is in itself vacant, and not represented by an heir; consequently the heirs are not entitled to citations, and notices in the proceedings by the creditors, to sell and distribute the property in payment of the debts..... *Poultney's Heirs vs. Cecil's Executor*, 321

5. After the time for deliberation has elapsed, an alienation fairly made by competent judicial authority, and for the payment of debts due by the deceased, and more especially mortgaged debts on the property alienated, will conclude the heirs who accept afterwards, with the benefit of inventory. *ib.*

6. It is a settled principle, that the retroactive effect of an acceptance, which is in truth but a fiction, should not be construed so as to extend and operate to the prejudice of the rights of third persons, previously acquired. *ib.*

7. It is only necessary to seek out and cite the heirs, in a proceeding to administer an estate *in concurso*, to ascertain if they will accept or renounce

the succession; and where the tutrix was present and renounced the community, and declined either accepting or renouncing for the minor heirs, whose rights were fully exercised by her, it was held that no other citation or notice to them was necessary. .... *Poultney's Heirs vs. Cecil's Executor*, 321

8. Money paid by a purchaser, for property bought at marshal's sale, which went to the payment of the debts of the owner, may be considered as benefiting his succession, even to the second inheritance; and the heir inheriting indirectly, or from the heir of the original owner, must refund on recovering this property, in proportion as he acquires from that succession.

*Lafon vs. White et al.*, 497

### INJUNCTION.

1. Where the application to obtain an injunction was not legally made, yet when all the facts necessary to authorise it are manifest by matters of record, it may be granted..... *Campbell vs. His Creditors*, 71

2. So, admitting the facts necessary to support the application for an injunction, were not legally established when it was granted, on a motion to dissolve, if from an inspection of the record it is evident to the court the applicant would be entitled to a new one, in case the first is dissolved, it will be sustained..... *ib.*

3. Pending an action of nullity, the party may procure an injunction to prevent the judgment creditor from gaining any advantage by the alleged fraud in obtaining his judgment, in pursuance of the general authority to issue injunctions conferred by article 303 of the Code of Practice.

*Garlick vs. Reece*, 101

4. The defendant cannot enjoin a judgment to obtain credits for payments made before suit was brought, and for the purpose of partial relief, leaving the judgment to subsist as to the balance... ..... *ib.*

5. An injunction cannot issue to stay execution, on grounds which might have been pleaded in defence, before judgment..... *ib.*

6. An injunction will not be granted to stay execution on a judgment for damages, for causes which existed before the rendition of the judgment.

*Peytavin vs. Winter*, 271

7. So, where the plaintiff in execution had a judgment for damages sustained by him in consequence of the defendant obstructing the natural drain of waters from his front tract of land, by stopping certain ditches leading from it over the back land claimed by both parties, and the defendant afterwards obtains the title to the disputed premises, an injunction will not be allowed him to stay execution on the judgment for damages..... *ib.*

## INSOLVENCY.

1. Property ceded of which the insolvent is not the absolute, but only the defeasible owner, and the sale of which is rescinded even after *cessio bonorum*, makes no part of the mass surrendered, and is not liable to any of the costs and charges of the cession.....*Mortee vs. Roache's Syndic*, 81
2. Where the meeting of creditors for the appointment of syndics, closed on the 9th of July, and an opposition was filed by a creditor on the 22d of the same month, to the appointment of one of the syndics, and alleging various grounds of error in the proceedings: *Held*, that as *ten entire days had expired in the interim*, after deducting Sundays, the opposition came too late.....*Goodale vs. His Creditors*, 125
3. It is required of creditors who oppose the appointment of syndics, on the ground of illegality in the proceedings, to file their opposition within ten days next following the appointment, counting from the day on which the proceedings closed before the notary.....*ib.*
4. The deliberations of creditors in the appointment of syndics become absolute without being homologated, after the lapse of ten days from that on which the deliberations closed before the notary, unless set aside by a timely opposition.....*ib.*
5. If the proceedings of creditors, in the appointment of syndics, are void upon their face, they can have no effect, and no formal opposition is necessary.....*ib.*
6. The law does not require that the *ten days* within which an opposition to the appointment of syndics must be filed, should be judicial days.....*ib.*
7. A debtor who is arrested and gives bail, is not considered in actual custody, so as to entitle him to the benefit of the act of 1808, for the relief of insolvent debtors in actual custody.....*Shultz vs. His Creditors*, 172
8. Opposition to the appointment of syndics by a creditor, must be made within the ten days next following the appointment before the notary.  
*Allen & Deblois vs. Their Creditors*, 221
9. So, where the tenth day following the appointment of syndics was Sunday, and the opposition of a creditor was filed on Monday, being the eleventh day thereafter: *Held*, that it was in time, because all judicial proceedings are forbidden on Sundays, and the party is entitled to his ten full legal days.....*ib.*
10. The claims of the hypothecary as well as chirographery creditors, constitute a part of the aggregate amount of passive debts of an insolvent,

and all together form the mass; a majority of three-fourths in number and amount of which is necessary to grant a forced respite.

*Janin vs. His Creditors*, 467

11. Creditors having a privilege or special mortgage on property of the insolvent, cannot be deprived of their right of seizure by a forced respite; but if this property is insufficient, they are restrained by the respite from proceeding against any other, for the balance unpaid..... *ib.*

12. The insolvent debtor cannot avail himself of an error in the notice to his creditors, and have their proceedings set aside, on the ground that through mistake he convened them on too early a day..... *ib.*

13. Syndics who have funds arising from the sale of the insolvent's property, are bound to distribute them without delay.

*Goodale vs. His Creditors*, 299

14. Where there are higher or concurrent mortgages or privileges than that of the creditor to whom the mortgaged premises have been adjudicated, or where he is obliged to support a portion of the charges of the *cessio bonorum*, he cannot retain the price of the purchase in satisfaction of his privileged claim..... *ib.*

15. A creditor who has a special mortgage or the vendor's privilege on certain property surrendered by his debtor, and at the sale by the syndics bids for it and it is adjudicated to him, he cannot be required to pay the price, but may retain it in satisfaction of his claim, except so far as it exceeds his mortgage, on giving security to refund or meet any charges that may afterwards be legally ordered..... *ib.*

16. The action of the creditor to avoid the contracts of his debtor, made in fraud of his rights in cases of insolvency, is prescribed by one year from the date of his judgment..... *Zacharie vs. Buckman et al.*, 305

17. Where the evidence shows that the sale by the debtor to a creditor was made for the purpose of protecting the property against the pursuits of other creditors, the debtor being insolvent at the time, any one or all of the other creditors have an action to annul the sale as made in fraud of their rights..... *ib.*

18. But where a creditor takes a mortgage on the property of his debtor, even on the eve of insolvency, it will be binding as against the other creditors, unless the knowledge of the debtor's insolvency at the time is brought home to the mortgage creditor..... *ib.*

19. A ceding debtor who is a merchant or a bookseller and stationer, and keeps books of accounts, is bound to surrender and present to the judge all

his commercial books before the order is granted staying proceedings against him or his property, and calling a meeting of his creditors.

*Boismare vs. His Creditors*, 315

20. In cases of insolvency and bankruptcy, fraud is presumed against the insolvent, and courts of justice should act on this principle, when that presumption is supported by the evidence of facts which corroborate it..... *ib.*

21. So, where the insolvent made a cession of his property, and prayed for the benefit of the insolvent laws, but withheld his commercial books or books of account: *Held*, that he is thereby debarred from any benefits or privileges provided by the laws for the relief of insolvent debtors..... *ib.*

22. Where a respite has been previously granted to a debtor by his creditors, and he dies before the first instalment becomes due, according to the terms of the respite, his estate will be considered insolvent, and the debts all due and demandable, notwithstanding the respite, if the estate is accepted with the benefit of inventory:

*Poultney's Heirs vs. Cecil's Executor*, 321

23. According to the Spanish law, an estate not represented by an heir, might be provided with an administrator or curator at the instance of the creditors, with a view to administering it *in concurso*, for the benefit of all concerned..... *ib.*

24. Under the Civil Code of 1808, the District Court had jurisdiction *ratione materiae* of proceedings against vacant estates administered for the benefit of creditors, and could legally appoint administrators, curators or syndics, to administer and dispose of the property of such estate, for the benefit of all interested therein..... *ib.*

25. Syndics may consent to the terms of sale of mortgaged property, that it be sold on a credit and without appraisement; and such consent is binding on the heirs who afterwards claim the property, unless they show they were injured by it..... *ib.*

## INSURANCE.

1. Where property shipped from New-Orleans to Liverpool is insured by the owners in London about the time of the shipment, and is soon after re-landed and stored, and insured by the factors in New-Orleans against fire, "for all whom it may concern," is destroyed by fire and the London office pays on the first policy: *Held*, that the latter cannot claim indemnity of the New-Orleans office unless it be a re-insurance, because the claimants have no insurable interest in the property destroyed. Their interest only extends to the risk insured against.

*Alliance Marine Assurance Co. vs. Louisiana State Insurance Co.*, 1

2. The contract of insurance although aleatory in its nature, is, nevertheless, synallagmatic and consensual in its inception and form, as containing the evidence of reciprocal obligations.

*Alliance Marine Assurance Co. vs. Louisiana State Insurance Co.* 1

3. To render a contract of insurance valid, the mutual consent of the parties is necessary. To support it requires proof of interest in the person acting and claiming, or those for whom he claims, or their sanction and ratification of his acts, and proof of the loss of the thing insured..... *ib.*

4. Factors have the power to insure for the principal owners, without special authority given; but, where factors insure property consigned to them "for account of whom it may concern," and which has been already insured by the owners in another country, the first insurers cannot claim indemnity from the last, when there was no special authority given, or subsequent ratification of the insurance by the first insurers before the loss happened..... *ib.*

5. Underwriters claiming the benefit of re-insurance, must show a special authority given to an agent for that purpose an express contract to that effect, or an express sanction of the acts of an agent effecting a subsequent insurance on the same risk, before loss..... *ib.*

6. When acts of barratry of the master and mariners were committed by smuggling on board articles prohibited by the revenue laws, and which were seized on the landing of the vessel, but she is not seized until more than twenty-four hours after landing at her port of destination: *Held*, that the insurers were not liable for the barratry, although insured against, when according to the terms of the policy, the vessel was moored twenty-four hours in good safety, before seizure.

*Mariatigi, Knight & Co. vs. Louisiana Insurance Co.* 65

7. Although the loss of the vessel was the immediate consequence of the seizure, the remote cause of which was the barratry of the master and mariners, the effects of which were insured against, yet, as no loss resulted until after the vessel had been moored twenty-four hours *before seizure*, she may be considered as in safety *quo ad*, the responsibility assumed by the insurers..... *ib.*

8. Mooring in good safety is defined to be the placing a vessel in a situation to unload her cargo; no loss of the vessel prevented the landing of any goods on board, except those smuggled. It is the loss for which the insurers promised indemnity, which was neither inchoate nor final, by any proceeding directly touching the vessel prior to her being moored twenty-four hours in safety..... *ib.*

9. Where the plaintiff took out a policy of insurance against fire "on his goods, stock in trade, &c:" *Held*, that the policy covered goods in stores,

bought on joint account and sold for the mutual profit of the insured and another person, the former being also in advance on the adventure: *Held*, also, that the insured was absolute owner of one-half of the goods, and had an insurable interest in them "as stock in trade," and also to cover his advances on the whole stock.....*Millaudon vs. Atlantic Insurance Co.*, 557

### INTEREST.

1. Banks cannot in any case take more interest than at the rate fixed by their charters. Where a bank charter fixes the rate at nine per centum, and ten is agreed upon, it will be reduced to the former sum.

*Bank of Louisiana vs. Stansbury et al.*, 257

2. Interest will not be allowed on an unliquidated demand, even when sanctioned by the verdict of a jury of merchants on a mercantile claim.

*Beal vs. M'Kiernan*, 569

### JUDGMENT.

1. Where a writ of *fieri facias* issues on a judgment, and the sheriff seizes and sells the property of the debtor under it: *Held*, that the sale and receipt of the money by the sheriff, discharges the judgment, even when the money is stayed in his hands by injunction obtained on the claim of another creditor.....*Daboval vs. Escurix*, 96

2. So, if after seizure and sale of the debtor's property, the sheriff wastes and expends the money, or embezzles it and fails to pay it over to the creditor, the judgment will be discharged, and another seizure cannot be made.....*ib.*

3. A judgment in admiralty obtained by privileged creditors against a steam-boat, in which three-fourths of the owners, in interest, are parties, is not conclusive against the interests of the other fourth owner, which is attached in the state court, at the suit of a creditor of such owner. The claimants must make other proof of their claims before they can proceed against it.....*Hart vs. Lodwick*, 164

4. A judgment of the United States District Court, affirmed by the Supreme Court, which concludes in these words: "judgment must be given for the defendant, and the plaintiff's petition must be dismissed," will be considered as final, in favor of the defendant, and as *res judicata* in another action for the same demand.....*Keene vs. McDonough*, 185

5. Where a final judgment of the Supreme Court of the United States is pleaded as *res judicata*, its correctness will not be inquired into by this court.....*ib.*

6. A judgment recovered by a minor against his tutor, when not attacked as fraudulent and collusive, is *prima facie* evidence of the amount due, the payment of which is secured by legal mortgage, when offered against a third possessor of the mortgaged premises.

*Winter vs. Thibodeaux's Executors et al.*, 193

7. Where a judgment has been rendered against a principal debtor for a certain sum, and against the third possessor of the mortgaged premises, and the latter alone appeals, the appellee cannot have the judgment amended on the appeal, so as to increase the amount or affect the interests of the debtor.....*Crocker vs. Williamson et al.*, 216

8. Where a party obtains a judgment on a rule, in which he has mistaken his remedy, the judgment will be reversed and the rule discharged at his costs in both courts.....*Richardson vs. Gurney*, 255

9. Where a judgment which was rendered in another state, on a mortgage, according to the forms of proceeding there, and which liquidates the original debt which the mortgage was given to secure, is made the foundation of a suit here, for the balance which the mortgaged property failed to pay, and the debtor was not in the state, or served with process, nor appeared either in person or by attorney to the suit: *Held*, that such judgment is not evidence of the balance of the debt claimed; but that it is still open for a defence, on the merits of the original claim.....*Spencer vs. Sloo*, 290

10. Where a judgment was given against the maker and endorsers of a promissory note *in solido*, and it appearing the endorsers were not liable, for want of legal notice of protest for non-payment, and where the maker had no cause of appeal: *Held*, that judgment be affirmed as to the latter, with ten per cent. damages, as for a frivolous appeal; and reversed and judgment of non-suit entered in favor of the former.

*New-Orleans Savings Bank vs. Richards et al.*, 550

11. Where suit is instituted on notes and debts before they are due, judgment may well be rendered for as much of the debt as is actually due at the time of filing the answer.....*Millaudon vs. Foucher*, 588

#### JURISDICTION.

1. The Supreme Court has power commensurate with its appellate jurisdiction, but will not exercise a general supervisory control over the proceedings of the inferior tribunals. It can only interpose its authority when necessary for the exercise of its appellate jurisdiction.

*State vs. Judge Waits*, 76

2. A curator's bond is the evidence of a contract, on which a civil action may be instituted in the courts of ordinary jurisdiction.

*Zander vs. Pile et al.*, 211

3. The Court of Probates is one of limited jurisdiction, which cannot be extended to any case not especially placed within its attribution.

*Zander vs. Pile et al.*, 211

### JURY.

1. Where it appears the jury were not influenced by the charge of the judge, but found their verdict in direct opposition to it, and on the grounds urged by the plaintiff, he cannot have the verdict set aside, because the charge was erroneous, and might have misled the jury.

*Keene vs. Lizardi et al.* 26

2. The court will not sanction the rule, that the jury must be guided in fixing the amount of damages, by the conduct of the wrong-doer, and the value or amount of his property, in an action against the owners of a vessel, for the wrongs of their captain or agent.....

ib.

3. Where the whole matter is left to the jury, who under instructions from the court, of which the adverse party did not complain, find a verdict against them, and where even the evidence leaves the case doubtful, the verdict will not be disturbed.....

*Thayer vs. Page et al.*, 135

4. The jury are the proper judges in cases turning on questions of fact, and particularly in reference to the value of property, when fraud and lesion are at issue. When there is nothing in the record to authorise it, the verdict will not be disturbed.....

*Bertot et al. vs. Tanner*, 168

5. Where the evidence does not legally authorise the verdict of the jury, although it may have in reality been based on the intentions of the parties, it will be set aside and the cause remanded for a new trial.

*Marie Louise, f. w. c., vs. Marot et al.* 475

6. The law makes the verdict of the jury a distinct and essential document, connecting the judgment of the court with the anterior proceedings.....

*Dubertrand vs. Laville*, 274

7. The verdict of the jury must be reduced to writing and signed by the foreman, with the mention of his capacity.....

ib.

8. Where the verdict of the jury was reduced to writing and signed by the foreman in the French language, it was set aside as unconstitutional, and the cause remanded for a new trial.....

ib.

9. It is not a sufficient compliance with the requisitions of the constitution that the verdict be recorded on the minutes of the court in the English language: it must be reduced to writing and signed by the foreman in that language.....

ib.

10. The verdict of a jury in a case involving altogether matters of fact, will not be disturbed, although the testimony preponderates in favor of the

other party, and is somewhat contradictory when the judge and jury who heard the witnesses were satisfied; and when the verdict is not so palpably erroneous as to require interference.....*Peters & Millard vs. Dorsey et al.*, 514

## LAWS.

1. The repeal of general laws as regards their obligatory force in the administration of justice, ought not to destroy the force of principles which were established when they were in force, when these principles comport with natural justice as applied to the conduct of men.

*Boismare vs. His Creditors*, 315

## LEGATEE.

1. Where a testatrix bequeathed certain specific legacies to her niece, and a moiety of all her moveable and immoveable property at her decease, instituting her niece a legatee by particular and general title, and the balance of her property she wills to the four children of her sister: *Held*, that both sets of legatees must be considered as claiming under universal titles, equal portions of the succession, and must both contribute equally to the payment of the particular legacies, debts and costs.

*Aubry et al. vs. Cajus, Executor, &c.*, 43

## LESSOR AND LESSEE.

1. The lessor of a cotton press has no lien, privilege or pledge for the payment of his rent, on cotton sent there by third persons, and transiently stored with the lessee to be re-pressed.....*Rea vs. Burt et al.*, 509

## MANDAMUS.

1. A *mandamus* will not issue to compel a judge to sign a judgment, after the lapse of three judicial days, when, even after that time, on the intervention of a creditor of one of the parties, suggesting fraud, the judge, in the exercise of his discretion, has granted a new trial.

*State vs. Judge Wattz*, 78

2. Whether a judge discreetly exercises his legal discretion in granting a new trial, in any case, is a question which cannot be entertained on an application for a *mandamus* to compel him to sign the judgment upon which the new trial is granted; the error if it be one can only be corrected on appeal.....ib.

3. A *mandamus* will not be awarded to compel the judge of the inferior court to allow an appeal from an interlocutory order which refuses to the

defendant six months delay to procure papers and prepare his answer, when he can be relieved on an appeal from the final judgment, on showing that the judge erred in refusing him the delay asked for.

*Gravier's Curator vs. Caraby's Executor*, 202

### MANDATE.

1. After the dissolution of a firm, neither partner can bind the other without his authority, and this authority is not to be derived from their former relations as partners, but by contract of mandate and letter of procuration..... *Peters & Millard et al. vs. Gardère, Syndic*, 565
2. Where the procuration to a partner from his co-partner is contained in the act of dissolution of the partnership, and authorises the mandatory to settle up and exhibit a balance sheet of their concern, it will not confer authority to represent the other partner and the firm *in concурso*, and vote for syndics on a claim of the partnership..... *ib.*
3. The appointment of a syndic is to constitute a new mandatory in relation to the debts due by the insolvent to the firm, and the procuration to vote for syndics must be express..... *ib.*

### MARITAL AND DOTAL RIGHTS.

1. Where parties to a marriage contract do not stipulate and fix their rights by a matrimonial convention, they are considered as having left those rights to be regulated by such laws as may be enacted from time to time, during the continuance of the marriage: *Held*, also, that laws authorising the alienation of the dotal property of the wife, and giving her power to mortgage her property and bind herself *in solido* with her husband, are constitutional and may be applied to marriages or marriage contracts, entered into previously to their passage.

*Pritchard et ux. vs. Citizens' Bank*, 130

2. Parties marrying in another state and removing to this, their rights concerning property they may afterwards acquire, are to be governed and regulated by the law of their domicil..... *ib.*
3. So, as to the rights of either spouse in the succession of the other, they will be tested, *not* by the law in force at the time of their marriage, but by that existing at the time the succession is opened..... *ib.*

4. The legislature has the power to remove or modify the legal incapacities of minors or married women, as may be deemed expedient. Incapacities and disabilities are creatures of the law, and may be at any time removed or modified by it *eadem modo*..... *ib.*

## MATERIAL MEN.

1. Persons furnishing materials to the undertaker have no action against the proprietor, when they suffer the latter to pay off the undertaker to his agreement or contracts without instituting suit..... *Miller vs. Brigot et al.*, 533

2. The proprietor is not even obliged to accept a draft drawn on him by the undertaker in favor of the material man, for *part* of a payment which is to become due, nor to pay it then: he may pay the whole sum to the undertaker when it is due, or when he receives the work, unless suit is previously brought by the material man..... *ib.*

## MINORS.

1. The general rule is, that the land and slaves belonging to minors cannot be sold for less than their appraised value. But the case of a citation provoked by a co-heir or co-proprietor, to effect a partition, is an exception, and puts minors on a legal footing with persons of full age.

*Jacobs et al. vs. Lewis's Heirs*, 177.

2. The prohibition against alienating minors' property for less than its appraised value, does not extend to a case of a judgment against him, or of a citation made at the instance of a co-heir or other co-proprietor..... *ib.*

3. Under the *Civil Code* of 1808, article 15, page 454, minors had a legal mortgage on the property of their tutors, from the day of his appointment: Held, also, that land acquired during the tutorship, is subject to the mortgage of the minor..... *Winter vs. Thibodeaux's Executor et al.*, 193

4. The rules and forms prescribed for the alienation of minors' property, as such, viz: "that it can only be sold in pursuance of the advice of a family meeting, and for its appraised value, do not apply to property alienated by judicial authority, at the instance of creditors, and for the payment of debts which formed a charge on the estate; because the sale of property in which minors were interested for the payment of debts, has always formed an exception to the rule..... *Poultney's Heirs vs. Cecil's Executor*, 321

5. Minor heirs, without acceptance, must be considered as strangers to the succession, which is in itself vacant and not represented by an heir; consequently the heirs are not entitled to citations and notices in the proceedings by the creditors, to sell and distribute the property, in payment of the debts..... *ib.*

6. So far as minors are prejudiced by the negligence or omissions of their tutors, and in the sale of their property as such, the title being fully vested in them, when it is made without all the formalities of law being complied with, they are entitled to restitution..... *Poultney's Heirs vs. Ogden*, 428

7. But, as regards the ordinary disposition and sale of the property of an estate in which the rights of minors are contingent and residuary, and which is subject to the claims of creditors, the acquired rights of third persons, resting on the faith of judicial proceedings, will not be disturbed, as the rules and forms for selling minors' property do not apply.

*Poultney's Heirs vs. Ogden*, 428.

#### NEW TRIAL.

1. Where the evidence does not legally authorise the verdict of the jury, although in reality based on the intentions of the parties, it will be set aside, and the cause remanded for a new trial.

*Marie Louise, f. w. c. vs. Marot et al.* 475

2. The Supreme Court will exercise the general power granted by law, and remand a cause for a trial *de novo*, when in its opinion justice requires it..... *ib.*

3. It is a general rule in remanding a cause for a new trial to be influenced alone by the pleadings, documents and evidence in the record; but in an action claiming the release of a person from slavery to liberty, every thing which may be properly done in *favorem libertatis*, should be done, even to notice facts *dehors* the record..... *ib.*

#### NOTICE.

1. When the endorser resides in a faubourg of New-Orleans, notice of protest addressed to him and deposited in the city post-office is insufficient, without showing reasonable diligence to give him personal notice.

*Porter et al. vs. Boyle et al.*, 170

2. Notice of protest for non-payment of a bill or note, must be given to the endorsers at the time, or they will not be liable; and this notice is required to be alleged and proved by other evidence than the instrument of protest..... *New-Orleans Savings Bank vs. Richards et al.*, 550

#### NOVATION.

1. The renewal of a note secured by mortgage, does not novate the original note and debt, so as to extinguish it and release the mortgage as its accessory, when a renewal is provided for in the mortgage, even if it be renewed in a different name, but proven to be the same debt.

*Palfrey vs. His Creditors*, 276

#### PARISH TREASURER.

1. The parish treasurer, although authorised to receive all moneys due to the parish, is not the proper person to sue and be sued in regard to parish claims..... *Helliun, Parish Treasurer vs. Maurin*, 111

2. A judgment rendered in a suit in which the parish treasurer is plaintiff, (if he be not expressly authorised) will not be *res judicata* against or in favor of the parish, in its corporate capacity.

*Helluin, Parish Treasurer, vs. Maurin*, 111.

3. The parish treasurer should be expressly authorised to institute suit, in order that the corporation be bound by whatever judgment is rendered in the case.....

ib.

### PARTITION.

1. So long as a partition, passed before the parish judge in his capacity of notary public, setting out the net amount of the estate, and the distributive share of each heir, and signed by each, remains in force or is not rescinded, an action of partition by an heir against his co-heirs to provoke a new partition, will not lie.....

*Dufau et ux. vs. Latour et al.*, 552

2. The partition made by the notary must govern as to the share of each heir, and if any of them received more than their share at the sale of the estate an action will lie in favor of the other heirs to recover and equalize the shares in courts of ordinary jurisdiction.....

ib.

3. Where the natural son, an illegitimate heir, is alleged to have received donations *inter vivos*, disguised in the form of sales, which are required by the legitimate heirs to be brought into partition, the Court of Probates has jurisdiction to inquire collaterally into the character of these sales, to ascertain if this property is to be included in the partition of the whole estate.....

*M'Caleb et al. vs. M'Caleb*, 459

4. In an action of partition between forced heirs of the deceased mother and surviving father, a partition in nature must be effected, if practicable, before resorting to a sale.....

*Placencia's Heirs vs. Placencia et al.*, 573

5. The surviving partner of the community has the right to have his half set off to him in nature, if it can be done.....

ib.

### PARTNERSHIP.

1. A partner may sue for and claim the dissolution, liquidation and settlement of the partnership concerns and recover whatever sums may be found due to him on such settlement, at the same time and in the same suit.

*Millaudon vs. Sylvestre et al.*, 262

2. Where the articles of partnership fix the rate of interest to be charged by either of the partners against the firm, at six per cent., and a partner renders an account for advances, and charges interest at ten per cent., which the other partners, conducting the establishment, receive and enter in their partnership books, it is written evidence of their assent to that rate of interest, and cannot afterwards be objected to.....

ib.

- | 3. Any one partner of a commercial firm has power to dispose of the personal property of the society for the use and benefit of the firm.  | PAGE. |
|--|-------|
| <i>Hermann &amp; Son vs. Louisiana State Insurance Co.</i> , 285   |       |
| 4. The signature of one partner in matters of simple contract, relating to the partnership, will bind the firm.....  | ib.   |
| 5. So, where A. brings a ship or vessel into partnership with B, at a certain valuation, and B takes out a policy of insurance on the vessel, and in his own name transfers to C, and the vessel is lost: <i>Held</i> , that C is entitled to receive the insurance money, in preference to the creditors of A, and who were such when he brought the vessel into the partnership..... | ib.   |
| 6. After the dissolution of a firm, neither partner can bind the other without his authority, which must not be derived from their former relations as partners, but by the contract of mandate and letter of procuration..... <i>Peters &amp; Millard et al. vs. Gardère, Syndic</i> , 565  |       |
| 7. Where the procuration to a partner from his co-partner is contained in the act of dissolution of the partnership and authorises the mandatory to settle up and exhibit a balance sheet of their concerns, it will not confer authority to represent the other partner and the firm in a <i>concurso</i> and vote for syndics on a claim of the partnership.....                     | ib.   |
| 8. Admitting an act of procuration gave the power to a partner to represent a debt of the firm in a <i>concurso</i> , and vote for syndics; yet, when the other partner attended and voted, it will be viewed as a revocation of the delegated authority.....  | ib.   |
| 9. The appointment of a syndic is to constitute a new mandatory in relation to the particular debt due by the insolvent; and a partner must have expressly delegated his authority to another, to be deprived of the right of voting personally, so far as his own interest is concerned.....  | ib.   |

#### PETITORY ACTION.

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|---|-----|
| 1. In a petitory action when the last warrantor cited sets up no title, but pleads the general issue, the plaintiff may show by legal evidence that the former derives his title from the same common source, and is forbidden to attack it..... <i>Bedford vs. Urquhart et al.</i> , 234 |     |
| 2. In this action the plaintiff is entitled to the use of any legal evidence or means by which he may render valid the title offered in support of his claim.....   | ib. |
| 3. Parties litigating in respect to their several and separate rights to certain property and trace their titles to one common source, are neither of them permitted to deny the title of their common author or original vendor.   | ib. |

4. When the pleadings and evidence of the case show, that the plaintiff, defendant and warrantors, all claim under one common and original title, neither will be permitted to attack it in a petitory action.

*Bedford vs. Urquhart et al.* 234.

5. In a petitory action, it is not necessary that the plaintiff should show title in himself good against the whole world and perfect, in order to recover against a naked possessor.....*ibid.*, 241.

6. The plaintiff in a petitory action is bound to produce a title as owner *causa idonea ad transferendum dominium*, to repel the presumption of ownership resulting from mere possession, and the date of his title ought to be anterior to the possession of the defendant.....*ib.*

7. As a general rule, an action of revendication can only be maintained by the owner; yet it may sometimes be sustained by one who is not the real owner, but was in the way of becoming so when he lost the possession. *ib.*

8. So, he who possessed in good faith under a just title, and lost the possession before the period required for prescription, can recover it in a petitory action from one who is in possession without title.....*ib.*

9. In a petitory action, the presumption of ownership resulting from mere possession, will be repelled by exhibiting such a title on the part of the plaintiff as would have formed the basis of the ten years' prescription, if the possession under it had continued, together with evidence of possession in virtue of such title, anterior to the commencement of the defendant's possession, and would otherwise authorise a judgment restoring him to possession as owner.....*ib.*

10. In a petitory action, persons (as heirs) claiming the estate, are bound to make good their title against the legal possessor, and in opposition, the latter has the right to set up and prove by every legal means, any title which may defeat the claim of the plaintiffs.

*Poultney's Heirs vs. Cecil's executor,* 321

### PLEDGE.

1. An act of pledge of bank stock to secure the payment of a specified note to the bank, and "for the payment of any other note or obligation which may be due or become due to said bank by the pledgors," will not be construed to extend to notes drawn to the order of another person and held by the bank, although one of them was due and protested at the time the pledge was given, but not mentioned in it.

*Syndics of Yard & Blois vs. Mechanics' & Traders' Bank,* 480

2. As regards the creditors of the pledgor, an act of pledge is not valid beyond the amount of the notes or debts specifically mentioned in the act. *ib.*

## PRACTICE.

1. A cause will not be remanded for errors on the trial, which could have no effect on the merits, or have influence in the case.

*Keene vs. Lizardi et al.*, 26

2. A statement of facts made out by the judge, will be deemed sufficient to enable the court to examine the case on its merits, when there is no other objection than the refusal of the appellees to consent to it.

*Robertson et al. vs. Penn*, 61

3. Where a mortgage debtor offers certain receipts as evidence of payments made to the original mortgagee before assignment, but which bear date more than a year before any payments were due, and he is interrogated on oath by the transferee of the claim, to say whether the receipts were not given for money won at play? and if not, what was the consideration? *Held*, that the party cannot be dispensed by the court from answering; and that the character of the receipts, and the circumstances under which they were given, should be inquired into.

*Maillan vs. Perron et ux.*, 138

4. Where an account current has been rendered to a party, and received and entered on his books without objection, he cannot afterwards object to it, on the ground that it contains overcharges or compound interest.

*Millaudon vs. Sylvestre & Son et al.*, 262

5. Courts of justice will not interfere in the contracts or transactions of men, to redress or prevent imaginary wrongs, or such evils as are very remotely probable; or barely possible in their occurrence.

*Lameyer vs. Rousan*, 280

6. When a resolution adopted by the stockholders of a corporation, ratifying certain sales of the corporation property, is produced, the officers of the corporation who urge the invalidity of the ratification, on the ground that the meeting was illegally called, must show such illegality, and support their allegations by proof.....*Dunn vs. New-Orleans Building Co.*, 483

7. Where a juror is discharged and another one substituted and sworn in his place, after the trial has commenced, and part of the evidence introduced, the plaintiff has the right to open his case again to the jury, and the trial to proceed *de novo*.....*Follin vs. Foucher et al.*, 563

8. The exception to the prematurity of a suit, is a dilatory one, and must be pleaded *in limine litis*.....*Millaudon vs. Foucher*, 587

## PRESCRIPTION.

1. An acknowledgment and promise by the debtor, that a debt is just and he will pay it on a contingency, which soon after happens, is a sufficient

PAGE.

promise and assusmit to interrupt prescription after it is complete, and bind  
the promissor in a new obligation to pay.....*Lafourcade vs. Barran*, 283

## PRIVILEGES AND MORTGAGES.

1. The creditor who proceeds against the property of his debtor by  
provisional seizure and sequestration, acquires no privilege thereon until he  
has obtained a judgment, and execution issues on it.

*Eymar vs. Lawrence et al.*, 38

2. The privilege of the captain of a vessel for his services, advances  
made and expenses paid on her last voyage, does not extend to the  
insurance money received as indemnity on her bottom, paid by the under-  
writers, when she is destroyed or lost by the perils of the sea.....  
*ib.*

3. In a voluntary sale of a ship, the creditor can pursue it and exercise  
his privilege on it, in the hands of the vendee; and in forced sales, the  
privilege attaches to the *price*, and the purchaser takes the vessel free of  
incumbrance; but when the ship is lost or perishes by the perils of the sea,  
the privilege is lost with her.....  
*ib.*

4. When goods are lost at sea, which are insured, they are not repre-  
sented by the sum or insurance money received from the underwriters, and  
the vendor's privilege does not extend thereto.....  
*ib.*

5. Creditors for supplies of ship chandlery, &c., furnished a vessel on her  
departure, loose their privilege on the vessel or her proceeds, for amount of  
such supplies, if they suffer her to depart on a second voyage before  
enforcing their privileged claim.....*Abat vs. Nartigue et al.*, 188

6. Where the payment of a note, executed by a commercial firm, is  
secured by a mortgage which stipulates to secure the endorsee, not only on  
the original note but for any renewals that may take place, and the renewal  
is made in the individual name of the liquidator of the firm: *Held*, that the  
debt is not novated nor the mortgage released, but that the transferee and  
endorsee of the mortgage and note, can recover and enforce payment against  
the mortgaged premises.....*Palfrey vs. His Creditors*, 276

7. A creditor who has a special mortgage or the vendor's privilege on  
certain property surrendered by his debtor, and at the sale by the syndics  
bids for it and it is adjudicated to him, he cannot be required to pay the  
*price* of his bid, but may retain it in satisfaction of his claim, except the  
surplus, on his giving security to refund or meet any legal charge  
afterwards.....*Goodale vs. His Creditors*, 299

8. Mortgage creditors are authorised to resist any attempt to sell the  
mortgaged property, otherwise than for the immediate payment of the  
mortgaged debts.....  
*ib.*



9. The proceeds of the sale of mortgaged property remains subject to the same rights and privileges which the creditor had on it before the sale.

*Goodale vs. His Creditors*, 299

10. Mortgagees are not prohibited from bidding for, and purchasing the mortgaged premises, when sold under execution.

*Poultnay's Heirs vs. Cecil's Executor*, 321

11. The landlord or lessor of a cotton press has no privilege, lien or pledge for the payment of his rent on cotton sent there by third persons, and transiently stored with the lessee, to be re-pressed.....*Rea vs. Burt et al.*, 509

12. Where a mortgage was given to secure endorsements to a certain specified amount, which are soon afterwards made, and it is proved that new notes are taken in renewal of the original ones, with the same endorsements: *Held*, that the endorser can claim the benefit of the mortgage, to secure the payment of the new notes, over ordinary creditors.

*Ory vs. His Creditors*, 529

#### RULE TO SHOW CAUSE.

1. In an action on a promissory note which is claimed by an intervening party, and when there is a defence set up or off-set pleaded to the merits, so as to show the matter in contestation is not liquidated, the court cannot, on a rule to show cause, require the defendant to pay the amount of the note sued on into court.....*Terrell et al. vs. Babcock, Gardiner & Co. et al.*, 23

2. When the creditor and debtor are at issue on the amount of a demand, either party is entitled to a trial, by jury or the court, and another creditor or claimant of the money, cannot require it to be paid into court, on a rule to show cause, before final judgment..... *ib.*

#### SALE.

1. Where the purchaser at the time of the sale has knowledge that his vendor's title arises from a simulated sale to him, or that the sale is rescinded since, as between the latter and his vendor, the plaintiff or last purchaser's situation is no better than the seller to him.

*Wells vs. Walker et al.*, 14

2. The principle is established and settled, that the first vendor has a right to avail himself of a counter letter in a simulated sale and recover back his property. His case is more favorable in relation to the person who purchased from his vendee when he is defendant and in possession..... *ib.*

3. A sale of immoveable property followed by tradition by a person styling himself attorney in fact of the vendor, whose power of attorney is

not produced, is only defective for want of the evidence of his authority and not a nullity of form resulting from his legal incapacity.

*Bedford vs. Urquhart et al.* 241

4. The sheriff's deed and return upon the execution and judgment, furnish *prima facie* evidence of a valid alienation; and he who attacks it must show that the forms of law have *not* been complied with.

*Poultney's Heirs vs. Cecil's executor,* 321

5. Where sales of property under execution are regular, the rights of purchasers will be maintained, although the judgment is afterwards reversed for want of jurisdiction in the court by which it was rendered..... ib.

6. If from the tacit admissions of a vendor, that he had acquired no title to a certain slave in his possession from the true owner, but, that the sale to him was simulated, and permits a creditor of his vendor to seize and sell the slave in contest at public sale, the purchaser will acquire a valid title thereto, without any suit to set aside the first sale..*Harris vs. Denison et al.* 543

### SEIZURE AND SALE.

1. Where the transferor of a mortgage by private act, afterwards goes before a notary public and two witnesses with a copy of the act of transfer, and acknowledges that the act of which that is a copy, was his proper act, with his signature affixed to the original: *Held*, that on presenting this instrument together with a copy of the act of mortgage, the transferee is entitled to an order of seizure and sale.....*Maillan vs. Perron et ux.*, 138

### SIMULATION.

1. In an action by a vendee against the vendors of his vendor, who are in possession and claim the contested premises as the original owners, alleging that the sale by them to the plaintiff's vendor was simulated and had been reconveyed as appeared by two counter letters: *Held*, that the question was whether the plaintiff knew at the time he purchased, of the defects of the seller's title and that it was simulated or had been rescinded.

*Wells vs. Walker et al.*, 14

2. The question of the buyer's knowledge of the defects in his vendor's title as that the latter held the property by a simulated sale, is one of fact which the jury has a right to decide from all the circumstances of the case. ib

3. Where the purchaser at the time of the sale has knowledge that his vendor's title is simulated or rescinded, as between the latter and his vendors, the plaintiff's situation is no better than the seller to him..... ib

	PAGE.
3. The first vendor can avail himself of a counter letter in a simulated sale and recover back his property. His case is more favorable in relation to the person who purchased from his vendee, when he is defendant and in possession.....	<i>Wells vs. Walker et al.</i> , 14

### STOCK COMPANIES.

1. Where a stockholder sells his stock, subscribed in his name to another, and the institution or company does no act releasing him from his obligation, he will be bound to pay up the instalments, as called for by the directors.....	<i>Louisiana Insurance Company vs. Gordon et al.</i> , 174
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### TUTOR.

1. A distinction or difference necessarily exists between the office of a testamentary executor or administrator of an inheritance or succession, and that of a tutor or guardian. The former deriving their authority in another state or foreign country, cannot exercise their office here until they obtain authority from the competent tribunal, (Court of Probates) to execute the will, or administer the property of the succession in this state.	
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*Chiapella vs. Couprey et al.*, 84

2. A tutor regularly appointed in another state or foreign country, his authority to sue for, receive and take possession of the property of his pupil in this state, will be recognised here without confirmation by any of the tribunals in this state.....	<i>ib.</i>
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3. So, a tutor residing in another state or foreign country, and regularly appointed by the law of his domicil, may exercise his office by an agent or attorney in fact, as regards receiving and recovering the property of the minor in this state.....	<i>ib.</i>
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### VACANT ESTATE.

1. According to the Civil Code of 1808, no one could be compelled to accept a succession and assume the quality of heir; and having accepted, might renounce and even accept again in some instances. Until such acceptance or renunciation, the inheritance was a fictitious being representing in every thing the deceased. Before acceptance, the title of the heir is not vested. So, where the widow renounces the community, and no person claimed as heir for thirteen years, the estate was considered and held to be vacant. <i>Civil Code of 1808, article 112, page 172.</i>	
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*Poultny's Heirs vs. Cecil's Executor*, 321

## VENDOR AND VENDEE.

1. A vendee only incurs in ordinary cases, the obligation to pay the price; and when that is acknowledged in the act to have been paid and received by the vendor, the signature of the vendee is not necessary to bind him or to show that he assented to the sale. His assent may be proved *aliunde*. .... *Stanley vs. Addison et al.*, 207
2. Purchasers of property, who collude with the vendor in the sale of it, with the view to defraud the true owner, cannot avail themselves of the omission to record the act of partnership under which the property is claimed by the owner. .... *Millaudon vs. Sylvestre & Son et al.*, 262
3. The first purchaser cannot repudiate the title by which he has sold to his vendee; and the averment in a petition by him that the proceedings were null under which the title was first acquired, cannot avail third persons who were not parties to them. .... *Poultney's Heirs vs. Cecil's Ex'r.*, 321
4. The last purchaser of a plantation and slaves may pay off previously existing debts, due by his vendors on the premises and for which they are liable; and be subrogated to the rights of these creditors, against his immediate vendor, and compensate such payments against the instalments as they become due. .... *Mitchell vs. Johnson*, 525

## VERDICT.—SEE JURY.

## WAGES.

1. Where the plaintiff claims from the executor of his uncle's estate, a large sum for his services as clerk and book-keeper, at a stated annual salary for the time he served, and there is no proof of any contract or agreement to pay a salary or wages at any particular rate per annum; and where that assumed by the plaintiff, clearly appears by his own interpolation in the books of his employer: *Held*, that he cannot recover in such a case, having depended on the generosity of his relation, for remuneration.

*Tilghman vs. Lewis's Estate*, 105

2. So, the plaintiff cannot recover, as on a *quantum meruit*, when he sues for wages on an agreement for an annual salary or hire, and when the evidence shows he served under no contract, expressed or implied, but depended on the beneficence of his employer, who was his relation; and when it is also shown, he improperly interpolated a feigned contract for wages, in the books he was employed to keep. .... \* *ib.*

## WARRANTY.

PAGE.

1. Where a defendant is sued on his note, and alleges error, that the amount and consideration for which it was given was paid to another person who was to save him harmless, and whom he calls in warranty : *Held*, that it is not such a case of simple or personal warranty as authorises a delay for calling in the warrantor.....*Anselm vs. Wilson*, 35

## WILL.

1. The intentions of the testator as expressed in the will should be carried into effect. But this instrument should be so construed, if possible, as to give meaning and effect to every clause, phrase and word. If contradictory phrases and expressions are used, so absolute in their different meanings as to be irreconcilable, one or the other must yield.

*Aubry et al. vs. Cagus, Executor, &c.*, 43

2. Where it is admitted by both parties that certain dispositions and provisions in a will are illegal and afford sufficient grounds to annul it, no other defects or alleged grounds of nullity will be decided on or noticed.

*Bernard's Heirs vs. Durocher et al.*, 232

3. As a general rule, in all testamentary dispositions of property, or dispositions *causa mortis*, the words *estate* and *succession* are to be taken and construed as synonymous.....*Shane & Withers vs. Withers's Legatees*, 489

4. Where a testator wills to his wife and two sisters, each one-third part of his whole estate, having no forced heirs, they will be considered as universal legatees, succeeding to the whole of the estate of which he died possessed, to the exclusion of all others. ....*ib.*

5. Universal legatees having seizin of the estate under the will, hold the place of heirs instituted by testament.....*ib.*

6. Where a testator (having two daughters, only heirs) bequeaths one-fifth of all his property to one, and directs the balance to be equally divided between the two daughters, his heirs instituted under his will, the first will be entitled to three-fifths and the second to two-fifths of the whole succession. The first is considered as taking an *increased* portion, rather than a legacy for one-fifth.....*Lafon vs. White et al.*, 497

## WITNESS.

1. The original holder of a note, who had with other creditors executed a release of the debtor, under an assignment of his property, is a competent witness to testify in a suit brought against the maker of the note by another person, who afterwards gets possession of the note unfairly.

*Morrison vs. French*, 118

